IN THE

Supreme Court of the United States

October Term, 1978

No. 78-303

WILLIAM E. COLBY and
VERNON A. WALTERS,
Petitioners,

v.

RODNEY D. DRIVER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

Appendices:

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions, Statutes and Rules:

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the court of appeals (App. A., pp. 1a-20a) is not yet reported. The opinion of the district court (App. B., pp. 21a-69a) is reported at 74 F.R.D. 382 (D.R.I. 1977).

Jurisdiction

The judgment of the court of appeals (App. C., p. 72a) was entered on May 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United

States intervened as a party below; accordingly, no court has certified to the Attorney General that the constitutionality of an Act of Congress affecting the public is drawn in question. 28 U.S.C. § 2403 may be applicable.

Questions Presented

1. Whether Section 2 of the Mandamus and Venue Act of 1962 grants the United States district courts nationwide personal jurisdiction over federal officials sued for damages in their individual capacities for acts allegedly performed under color of law.

2. Whether such grant of personal jurisdiction would violate the due process clause of the fifth amendment.

Statute and Constitutional Provisions Involved

The statute involved is Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e):[1]

> "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

1. The statute was amended by Act of Oct. 21, 1976, Pub. L. No. 94-574 § 2, 90 Stat. 2721-2722. This amendment has no bearing on the vitality of the questions presented.

The constitutional provision involved is the fifth amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Statement

This action seeking damages in excess of $1 billion was brought in the United States District Court for the District of Rhode Island against 25 present and former federal officials, sued individually and in their official or "former official" capacities.[2] Subject matter jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331(a), 1339, 1343, 1361 and 5 U.S.C. § 702.

The district court certified the action as a class action pursuant to Fed. R. Civ. P. 23(b)(2), (3) and 23(c) (App. B., pp. 54a-69a; App. D., pp. 73a-88a). The plaintiffs below purport to represent a class of "tens of thousands" of individuals whose mail was allegedly opened, read and copied in violation of law. Petitioners and other defendants are alleged to have authorized these activities. The complaint seeks damages from petitioners in their individual capacities of $20,000 for each opened letter and $100,000 in punitive damages for each class member, together with injunctive and declaratory relief. Recovery is sought under the first, fourth, fifth and ninth amendments, and various federal statutes.

2. Plaintiffs below and respondents herein are: Rodney D. Driver, Michael Avery, B. Leonard Avery, Victoria Wilson and Julia Siebel. Defendants below, aside from petitioners, and also respondents herein are: Richard Helms, James R. Schlesinger, William F. Raborn, Jr., Marshall S. Carter, Rufus L. Taylor, Robert E. Cushman, Jr., Richard M. Bissell, Jr., Thomas Karamassines, Cord Meyer, James J. Angleton, William Hood, Roy Rocca, Richard Ober, Howard Osborn, James Murphy, James Edward Day, Lawrence F. O'Brien, William Marvin Watson, Winton M. Blount, Elmer T. Klassen, William J. Cotter, Louis Patrick Gray, III, and McGeorge Bundy.

The events giving rise to this lawsuit are generally referred to as the East Coast Mail Intercept, pursuant to which the Central Intelligence Agency ("CIA") inspected selected pieces of first-class mail destined to or originating in the Soviet Union from 1953 to 1973.[3] The mail intercept took place as the mail arrived at the United States border in New York City. No warrant was secured in connection with these "cold war" foreign intelligence border inspections, virtually all of which took place prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972), and the decision in *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) *cert. denied*, 425 U.S. 944 (1976). *But See United States* v. *Ramsey*, 97 S. Ct. 1972 (1978) (which indicates that the fourth amendment may not require a warrant for such a mail intercept).

Petitioner William E. Colby ("Colby") was Deputy Director for Operations of the CIA from March 1973 to August 1973. Colby was appointed Director of Central Intelligence in September 1973, and he held that position when the complaint was filed below.[4] Petitioner Vernon A. Walters ("Walters") was appointed Deputy Director of Central Intelligence in May 1972 and was in that office when the complaint was filed.[5]

Colby was served with process in this action by personal delivery to the Associate General Counsel of the CIA, at

3. These events are discussed in detail in the Report to the President by the Commission on CIA Activities (June 6, 1975), and the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, Book III, 559-679, S. Rep. No. 94-755, 94th Cong., 2nd Session (1976) ("Senate Committee Report").

4. Colby learned of the East Coast Mail Intercept shortly before it was terminated at his direction. Senate Committee Report at 604.

5. Walter's affidavit in the district court indicated that he first learned of the East Coast Mail Intercept after it was terminated.

his office in Virginia. Walters was served by personal delivery in Virginia. Colby and Walters were not "present" in, and the acts complained of did not occur in, Rhode Island. One of the plaintiffs resides in Rhode Island.

In the district court, petitioners moved to dismiss for lack of personal jurisdiction, improper venue and insufficient service. The court held that solely by virtue of 28 U.S.C. § 1391(e), and notwithstanding petitioners' lack of "presence" in Rhode Island, it had personal jurisdiction over petitioners and other defendants sued for damages in their individual capacities and that venue was also proper pursuant to § 1391(e). The district court further held that such an exercise of personal jurisdiction was not violative of fifth amendment due process. This decision was certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The court of appeals affirmed the judgment of the district court as to petitioners who were CIA officials when the complaint was filed; but it reversed the district court as to defendants below who were "former federal officials" when the complaint was filed.

Reasons for Granting the Writ

The Court of Appeals has Decided an Important Federal Jurisdictional Question Which Should be Settled by This Court Without Delay

The court of appeals read 28 U.S.C. § 1391(e) as applicable to federal officials sued for damages in their individual capacities. It then read the statute as not only a rule governing service of process and venue, but also as an independent grant of unlimited nationwide personal jurisdiction. In its view, federal employment alone subjects all federal officials to suit for damages in their individual capacities in every district court so long as it is alleged

that the acts complained of were performed under color of law.

This construction of § 1391(e), supported neither by its language nor its legislative history, is the most radical departure from the standards governing personal jurisdiction established by Congress and this Court.

The court of appeals held that the "plain language" of § 1391(e) somehow compelled its holding, but this is not so. The statute provides jurisdiction over an officer or employee "*acting* in his official capacity or under color of legal authority" (emphasis added). The use of the active present tense indicates that damage actions against an official in his individual capacity for his *past* conduct are not covered by the statute. This is wholly consistent with its place in the Mandamus and Venue Act of 1962; a suit in the nature of mandamus or prohibition is the appropriate remedy against an official whose *present* conduct is unlawful.

Petitioners are not, however, seeking to have this Court resolve merely a grammatical dispute. As Judge Friendly observed, § 1391(e) cannot be construed:

> "as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *Natural Resources Defense Council* v. *TVA*, 459 F.2d 255, 257 (2nd Cir. 1972).

And, as this Court recently observed, there is no "plain meaning rule" which bars scrutiny of a statute's legislative history, however clear the words might seem. *United States* v. *Culbert*, 46 U.S.L.W. 4259, 4260 (U.S. March 28, 1978). The legislative history of this statute, which the court of appeals viewed as "at best ambiguous"[6] (App. A at 15a), demonstrates the error below.

6. *Compare Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 624 (1925), where the Court cautioned that when Congress makes an exception to the general rule of personal jurisdiction it is "carefully guarded" and "clearly expressed."

The Mandamus and Venue Act of 1962, now codified at 28 U.S.C. § § 1361, 1391(e), was enacted to treat a specific problem. It was simply designed to decentralize nonstatutory review actions by making it possible for all federal district courts to issue writs in the nature of mandamus. H.R. Rep. No. 536, 87th Cong. 1st Sess. (1961) at 2 ("House Report") (annexed as App. E., pp. 89a-98a).

Because of an historic anomoly, the only federal courts which had jurisdiction to issue writs in the nature of mandamus and prohibition were those in the District of Columbia. *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 503 (1813); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 522, 650 (1838). Section 1 of the Act (§ 1361) made remedies in the nature of mandamus available in all federal district courts. To be effective, however, the venue and service of process requirements in such actions had to be modified, again because of a specific problem.

Superior federal officials were ordinarily indispensible parties to suits in the nature of mandamus. When sued in their official capacities, federal officials could only be effectively served with process, and venue was only proper, at their official stations, usually Washington, D.C. *Martinez* v. *Seaton*, 285 F.2d 587, 589 (10th Cir. 1961). Section 2 of the Act (§ 1391(e)) was enacted to permit service of process upon these federal officials when sued in their official capacities, and to allow venue outside of Washington, D.C.

Congress was not faced with a problem of personal jurisdiction as opposed to mechanical problem of service of process and venue. No problem of personal jurisdiction existed. In their official capacities superior federal officials are ordinarily "present" everywhere in the United States through the "hierarchy of command," *Strait* v. *Laird*, 406 U.S. 341, 345 (1972), and thus subject to personal jurisdiction in their official capacities in all district courts. Nor

was Congress concerned with actions against officials in their individual capacities because such actions were not restricted to Washington, D.C. or the district of their official station. In their individual capacities, federal officials were subject to service of process wherever they were found.

Reading the act as a whole and against its legislative history, it is clear that this case is not within the scope of § 1391(e) at all. Section 1391(e) does not apply to federal officials sued for damages in their individual capacities and it does not provide an independent basis for personal jurisdiction.

The problem posed by the court of appeals decision is of increasing importance. Four members of this Court recently noted:

> "The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts. Table 11; 1976 *id.* Table 17." *Butz* v. *Economou* 46 U.S.L.W. 4952, 4965 (U.S. June 29, 1978) (Rehnquist, J. dissenting).

A compilation of 17 recent damage actions involving the federal jurisdictional issue presented here is annexed as App. F., p. 99a.

The legislative history of § 1391(e) makes clear that it was not intended to apply to those cases in this new wave of litigation which seek damages out of the pockets of federal officials. Rather, the only damage actions § 1391(e) was meant to encompass are those which are brought nominally

against the official and which would otherwise have been brought directly against the United States were it not for the bar of sovereign immunity. These damage actions are largely those in which mandamus is sought to compel payments wrongfully withheld. *See, e.g., Roberts* v. *United States,* 176 U.S. 221 (1900); *Kendall* v. *United States,* 37 U.S. (12 Pet.) 522 (1838); *Clackamas County* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot,* 349 U.S. 909 (1955). The House Report accompanying § 1391(e) said just that:

> "By including the officer or employee, both in his official capacity and acting *under color of legal authority,* the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally against the officer in his individual capacity,* even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in *essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the *fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." House Report at 3-4; App. E., at 94a (emphasis added).

The court of appeals was unable adequately to reconcile its holding with this clear expression of Congressional intent. App. A at 13a-14a.

The vexatious nature of the holding below is amply demonstrated in this case. Petitioner Colby, for example, who is now retired from government service and who resides in Maryland, has been sued in his individual capacity for damages, based upon the same allegations of mail interception, in federal courts in New York, California, Washington, D.C. and Rhode Island. *Grove Press, Inc.* v. *CIA,* 76 Civ. 5509 (S.D.N.Y.); *Kipperman* v. *McCone,* 422 F. Supp. 860 (N.D. Cal. 1976); *Halkin* v. *Helms,* Civil No. 75-1773 (D.D.C.).

The conditions under which federal officials can be sued for damages in connection with their official duties are important to "the effective functioning of government." *Butz* v. *Economou, supra,* at 4953. When § 1391(e) was enacted, and prior to the decision in *Economou* last term and *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), high federal officials were generally thought to be absolutely immune from suit in damage actions which challenged official conduct. Indeed, a federal claim for relief could not then be stated seeking to impose liability upon federal officials for acts committed under federal authority. *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652 (1963). Now that this Court has held that such suits can be maintained, the question of where and how they can be brought and the scope of § 1391(e) is highly significant.

The holding of the court of appeals, in conjunction with the "qualified immunity" doctrine of *Economou* and the "constitutional tort" doctrine of *Bivens,* makes it certain that federal officials will be compelled to defend their actions in distant, burdensome forums. The strain faced by a federal official defending himself in a far away court while attempting to carry out his official duties can impair his ability to do either. This is particularly so if the federal official is forced to bear the financial burden of his own

defense. 28 C.F.R. §§ 50.15, 50.16 (set forth as App. G., pp. 100a-106a). None of these hardships on public servants was intended by Congress in enacting § 1391(e).

The Court of Appeals has Decided an Important Federal Jurisdictional Question in Conflict With Decisions of the Courts of Appeals for the Second and Ninth Circuits

The decision below conflicts with prior decisions of the Courts of Appeals for the Second and Ninth Circuits, which held: (i) that § 1391(e) provides for the manner of serving process and does not, standing alone, confer personal jurisdiction over federal officials; and (ii) that § 1391(e) is limited to suits which, prior to its enactment, could have been brought *only* in the District of Columbia. It does, however, follow the holding of the District of Columbia Circuit in *Briggs* v. *Goodwin,* 569 F.2d 1 (D.C. Cir. 1977), *petition for cert. filed* No. 77-1546 (April 30, 1978) (which recognized "that other courts have entertained divergent views on the relation of Section 1391(e) to damage actions against federal officials." *Id.* at 5-6).

In *United States ex rel. Rudick* v. *Laird,* 412 F.2d 16 (2d Cir.), *cert. denied,* 396 U.S. 918 (1969), the Second Circuit held that § 1391(e) "is a venue provision as its title clearly specifies," *id.* at 20, and that its service provision does not provide personal jurisdiction. The Court stated:

> "The concepts of personal jurisdiction and venue are closely related but nonetheless distinct. * * * [T]hus venue deals with the question of which court, or courts, of those which possess adequate personal * * * jurisdiction, may hear the specific matter in question. In short, jurisdiction must first be found over * * * the persons involved in the cause before the question of venue can properly be reached.
>
> Therefore, in relation to Section 1391(e), that provision can be said to authorize suit in the South-

> ern District of New York in the instant case if, but only if, the jurisdiction—personal and subject matter—otherwise exists." *Id.* at 20.

See Marsh v. *Kitchen*, 480 F.2d 1270, 1273 n.8 (2d Cir. 1973).

Rudick, (cited by this Court in *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971)), cannot be distinguished on the grounds that it is a habeas corpus case and 28 U.S.C. § 2241(a) is an exception to § 1391(e). A court may entertain a habeas corpus petition only if it has personal jurisdiction over the custodian, under the standards applicable in ordinary civil litigation. *Strait* v. *Laird, supra* at 345 n.2; *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973). If § 1391(e) supplies personal jurisdiction, there is nothing in 28 U.S.C. § 2241(a) to prevent its application to habeas corpus. Section 2241(a) simply does not address the scope of personal jurisdiction. Most telling is that *Rudick* has been followed in district courts in cases not involving habeas corpus. *Bertoli* v. *SEC*, 77 Civ. 1450 (S.D.N.Y. 11/4/77) (copy annexed as App. H., pp. 107a-111a); *Kipperman* v. *McCone*, 422 F. Supp. 860, 871 (N.D. Cal. 1976).

The rule in the Ninth Circuit is the same. In *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971), the court held that "Section 1391 may not be utilized to confer jurisdiction, but can be in order to effectuate jurisdiction once it has attached." *Id.* at 834. *Powers* v. *Mitchell*, 463 F.2d 212 (9th Cir. 1972), similarly held that § 1391(e), which also "extends jurisdiction to 'agencies', does not allow a federal court to extend its jurisdiction to a local federal agency such as a selective service board which is not within the court's territorial jurisdiction." *Id.* at 213.

Under the principles established in the Second and Ninth Circuits, § 1391(e) would not have supplied a basis for personal jurisdiction in this case. Those courts have held, contrary to the holding below, that § 1391(e) provides only for the manner of service, and is not an independent basis for personal jurisdiction.

In *Natural Resources Defense Council* v. *TVA*, 459 F.2d 255 (2d Cir. 1972), the Second Circuit held that § 1391(e) was inapplicable to a suit against the TVA and its officers because Congress intended it to apply to suits which could then have been brought "with assurance *only* in the District of Columbia."[7] *Id.* at 259 (emphasis added). *Accord*, *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1383-84 (2d Cir. 1970); *Sigler* v. *Levan*, No. 77-CA-35 (W.D. Tex. 3/22/78) (copy annexed as App. I., pp. 112a-124a); *Rimar* v. *McCowan*, 374 F.Supp. 1179 (E.D. Mich. 1974). This is not such a suit.

The court of appeals incorrectly viewed the holding in *Natural Resources Defense Council* as an application of 16 U.S.C. § 831g(a), which merely fixes the residence of the TVA in the Northern District of Alabama for purpose of venue where its residence is relevant.[8] If § 1391(e) is applicable to the T.V.A., its residence is not relevant to the question of venue. The Second Circuit, after noting that service of process on the TVA and its officials was sought to be predicated upon § 1391(e), said:

> "The TVA was not within the bill as it had passed the House, since it was not the sort of federal agency that could have been sued with assurance only in the District of Columbia. It did not come within the "mischief" at which the new statute was directed,

7. Indeed, the one time this Court discussed § 1391(e), it said: "That section was enacted to broaden venue of civil actions which could previously have been brought only in the District of Columbia. See H.R. Rep. No. 536, 87th Cong., 1st Sess. 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2." *Schlanger* v. *Seamans, supra*, at 490 n.4.

8. Of course, 16 U.S.C. § 831g(a) has no applicability to the TVA officials who were also defendants in *Natural Resources Defense Council* v. *TVA, supra.*

> and to which the Committee said it was limited. TVA had always been suable, subject to the same venue limitations as any other corporation, not only in its congressionally fixed residence, the Northern District of Alabama, but in any district where it did business." 459 F.2d at 259.

Similarly, petitioners could always have been sued for damages in their individual capacities outside the District of Columbia. They were not amenable to suit only in the District of Columbia. *Compare Nesbitt Fruit Products, Inc.* v. *Wallace,* 17 F. Supp. 141, 143 (S.D. Iowa 1936) ***with*** *Martinez* v. *Seaton, supra* at 589.

The decision of the court of appeals not only presents important jurisdictional questions, but exacerbates a conflict among the circuits which can lead to unseemly forum shopping and which should be resolved now.

The Court of Appeals has Decided an Important Constitutional Issue Which Should be Settled by This Court

In *United States* v. *Scophony Corp.,* 333 U.S. 795, 804 n.13, 818 (1948), this Court reserved the question of whether due process limitations on personal jurisdiction similar to those of the fourteenth amendment set out in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), are applicable to federal question litigation in federal courts by reason of the fifth amendment.

Petitioners submit that "traditional notions of fair play and substantial justice" to the defendant are limitations imposed by the fifth amendment upon the exercise of personal jurisdiction.

In the 30 years since *Scophony,* the constitutional question presented has not been resolved by this Court because, putting § 1391(e) aside, there is no federal statute permitting the exercise of personal jurisdiction in circumstances violative of "fair play and substantial justice." It is true,

as the court of appeals noted, that some federal statutes provide for nationwide service of process. However, none are subject to fifth amendment challenge because each contains a device which insures fairness to the defendant. App. J., pp. 125a-128a.

The court of appeals held however that § 1391(e) provides for personal jurisdiction, although its application in this case might violate traditional notions of fair play and substantial justice, as set out in *International Shoe.* The court suggested a number of bases for upholding unlimited nationwide jurisdiction.

The first basis suggested was that Congress has virtually plenary power over all those found within the territorial limits of the United States. As a theory of jurisdiction this rests upon the jurisprudence of *Pennoyer* v. *Neff,* 95 U.S. 714 (1877), whose touchstones of jurisdiction were "power" and "territory". Recently, under the authority of the fourteenth amendment, this Court wholly rejected the underpinnings of *Pennoyer* in *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). *Shaffer* held that although a state may have territorial power over property, a state may exercise that power by assuming jurisdiction to adjudicate rights concerning the property only in a manner consistent with the fairness standard set forth in *International Shoe.* Questions of "power" and "territory", which to the Court of Appeals were dispositive, begin and do not end the inquiry.

Similarly, the fact that the United States has territorial power over the petitioner does not end the inquiry. The due process clause of the fifth amendment imposes a fairness restriction on the United States similar to that which the fourteenth amendment imposes on the states. *See* P. Bator, *et al., Hart & Wechsler's, The Federal Courts and the Federal System* 1106 (2d ed. 1973). The power of the United States over all those in its territory is not absolute; it is insufficient by itself to confer jurisdiction over peti-

tioners, for that power may only be exercised in a manner consistent with due process.

The American Law Institute has recognized that what was treated by the court of appeals as a single question consists of two analytically discrete issues. It noted in a memorandum annexed to the *Study of The Division of Jurisdiction Between State and Federal Courts* (official draft 1969):

> "We are here concerned with the general power of Congress to authorize service of process across state lines, not with possible limits on the use of such power dictated by considerations of fairness embodied in the due process clause of the Fifth Amendment." *Id.* at 437, Supporting Memorandum B. The Constitutionality of Service of Federal Court Process Without Regard to State Boundaries.

It is the latter issue which we are concerned with here.

The second argument advanced by the court of appeals was that in federal courts there is no particular jurisdictional significance to state boundaries. With this general proposition, there need not be a quarrel. Indeed, there is now one judicial district which crosses state lines. *See* 28 U.S.C. § 131. However, the fact that a particular assertion of personal jurisdiction which causes a defendant to travel across a state line is constitutional does not imply that *all* are. It is a substantially different matter, for example, to require petitioner Colby to personally defend himself in jurisdictions from California to Rhode Island with which he has had no contact. The court of appeals failed to make any determination that the exercise of personal jurisdiction in *this* case is consistent with fair play.

It is no answer that a motion for change of venue under 28 U.S.C. § 1404(a) will remedy any problem posed by § 1391(e) as the court of appeals seems to indicate. Relief under § 1404(a) is a matter of nearly unreviewable discretion. *See In re Amarnick*, 558 F.2d 110 (2d Cir. 1977). In exercising that discretion, the district court must consider the convenience and interests of the plaintiffs and witnesses, considerations which are irrelevant to the exercise of personal jurisdiction and the due process protections which must be afforded to defendants. Moreover, if the theoretical opportunity for a change of venue provides sufficient protection to every defendant, there could be no meaningful limitation on personal jurisdiction, for that remedy is always available.

Finally the court of appeals held that fifth amendment due process merely requires that petitioners be given reasonable notice that an action has been commenced against them. This Court has never suggested that notice is anything but one component of due process.

This assertion of personal jurisdiction, at odds with traditional notions of fair play and substantial justice to the petitioners, violates due process.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: August 22, 1978

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1482

RODNEY D. DRIVER, et al.,

APPELLEES,

v.

RICHARD HELMS, et al.,

APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL AND BOWNES, *Circuit Judges.*

Walter H. Fleischer, Donald J. Cohn and *Jacquelin A. Swords,* with whom *Earl Nemser, Cadwalader, Wickersham & Taft, George M. Vetter, Jr., Hinckley, Allen, Salisbury & Parson, Seymour Glanzer, Kenneth Adams, Joel Kleinman, Dickstein, Shapiro & Morin, James V. Kearney, Nancy E. Friedman, Webster & Sheffield, Alan T. Dworkin, Aisenberg & Dworkin, Joseph V. Cavanagh, Higgins, Cavanagh & Cooney, Charles R. Donnenfeld, Cameron M. Blake, Rodney F. Page, Arent, Fox, Kintener, Plotkin & Kahn, Guy J. Wells, Gunning, LaFazia & Gnys, Inc., Alfred F. Belcuore, Cole and Groner, P.C., Harry W. Asquith, Edward W. Moses, Swan, Kenney, Jenckes & Asquith, Wallace L. Duncan, Duncan, Brown, Weinberg & Palmer, Joseph Dailey* and *Breed, Abbott & Morgan* were on briefs, for appellants.

Melvin L. Wulf, with whom *Clark, Wulf & Levine, Burt Neuborne, Richard W. Zacks, Winograd, Shine & Zacks,* and *Joel M. Gora* were on brief, for appellees.

Barbara Allen Babcock, Assistant Attorney General, *Lincoln C. Almond,* United States Attorney, *Robert E. Kopp* and *Paul Blankenstein,* Attorneys, Appellate Section, Civil Division, Department of Justice, on brief for United States, amicus curiae.

May 25, 1978

COFFIN, *Chief Judge.* Plaintiffs-appellees brought this action in 1975 in the federal district court for the district of Rhode Island on behalf of themselves and others similarly situated. Their complaint alleges that the defendants-appellants[1] illegally interfered with their mail, thereby violating appellees' rights under the First, Fourth, Fifth, and Ninth Amendments. The suit seeks damages and declaratory and injunctive relief. Subject matter jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1339, 1343, 1361, and 5 U.S.C. § 702.

Appellants are 25 present or former United States government officials, each sued in his individual and in his official or former official capacity. One of the named plaintiffs, Driver, lives in Rhode Island,[2] but none of the appellants reside in or have substantial contacts with Rhode Island, and the complaint does not allege that any illegal activity occurred in Rhode Island.[3] Therefore, venue is not proper under 28 U.S.C. § 1391(b), and, since none of the appellants were served within Rhode Island,[4] service of process was inappropriate under F. R. Civ. P. 4(f).

Appellees invoke 28 U.S.C. § 1391(e) to support venue and service of process:[5]

> "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."[6]

Appellants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) (lack of jurisdiction over the person), 12(b)(3) (improper venue), and 12(b)(4) (insufficiency of process). The district court denied these motions, but certified that the questions involved controlling issues of law as to which there is substantial ground for difference of opinion and that an immediate appeal could materially advance the litigation. *Driver* v. *Helms,* 74 F.R.D. 382, 401-02 (D. R.I. 1977). We thus have appellate jurisdiction under 28 U.S.C. § 1292(b).

Appellants argue that 28 U.S.C. § 1391(e), contrary to the holding of the district court, does not give venue to the district court in Rhode Island, does not give the court

[1] Other defendants in the case below are not parties to this appeal.

[2] The other named plaintiffs are residents of New York, Minnesota, Connecticut, and California.

[3] The illegal interference with appellees' first-class mail is alleged to have occurred in New York City.

[4] The appellants each were served by certified mail outside Rhode Island.

[5] Appellees also suggested that Rhode Island's long arm statute supplied jurisdiction. R.I. Gen. Laws § 9-5-33 (1956). *See Driver* v. *Helms,* 74 F.R.D. 382, 400 n. 23 (D. R.I. 1977). This issue is not presented by this appeal.

[6] 28 U.S.C. § 1391(e) was amended in 1976. The word "each" was changed to "a" in the first sentence, and the following sentence was added to the end of the first paragraph:

> "Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party."

P.L. 94-574, § 3, 90 Stat. 2721 (Oct. 21, 1976).

jurisdiction over the persons of the appellants, and does not authorize the service of process on these appellants. They argue that reliance on § 1391(e) is misplaced because that section does not apply to former officials, does not apply to suits against officials for damages in their individual capacities, and does not independently supply in personam jurisdiction.

The Former Officials

Ordinarily the plain meaning of the language of a statute is controlling. *See Massachusetts Financial Services, Inc.* v. *Securities Protector Investor Corp.*, 545 F.2d 754, 756 (1st Cir. 1976). Section 1391(e) applies, by its terms, when a "defendant *is* an officer or employee of the United States . . . *acting* in his official capacity or under color of legal authority . . . ." (emphasis added) Because the operative language is in the present tense, we read the section to exclude a defendant who *was* an officer or employee.

"Of course, deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of statutory language when adherence to it would produce an absurd result or 'an unreasonable one "plainly at variance with the policy of the legislation as a whole."' " *Massachusetts Financial Services, supra,* 545 F.2d at 756, *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940), *quoting Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *cf. Natural Resources Defense Counsel* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972) (eschewing the "tyranny of literalness").[7] We do not, however, find any indication in the statute itself or in the legislative

[7] "[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *Culbert*, 46 U.S.L.W. 4259, 4260 n. 4 (U.S. March 28, 1978), *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940).

history that former officials were meant to be included. We are not alone in this conclusion. *See Kipperman* v. *McCone*, 422 F. Supp. 860, 876 (N.D. Cal. 1976); *Wu* v. *Keeney*, 384 F. Supp. 1161, 1168 (D. D.C. 1974).

The cases that have reached a contrary result have decided that excluding former officials would undercut the policies of § 1391(e). *See Driver* v. *Helms, supra*, 74 F.R.D. at 398-400; *United States* v. *McAninch*, 435 F. Supp. 240, 245 (E.D. N.Y. 1977); *Lowenstein* v. *Rooney*, 401 F. Supp. 952, 962 (E.D. N.Y. 1975). We do not think it absurd or plainly at variance with the policies of § 1391(e) to limit it to those who are government officials at the time the action is brought.[8] We are unimpressed by the specter of government officials resigning their positions simply because they fear an action might be brought against them. As the court below noted, resignation would not terminate their liability. *See Driver* v. *Helms, supra*, 74 F.R.D. at 399-400. The most an official could gain would be to avoid venue in the district where a plainitiff lives. A career in government service is, one would think, a disproportionate sacrifice to make for so small a gain. Moreover, we are not persuaded that Congress' desire "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government", H. Rep. No. 536, 87th Cong., 1st Sess. 3 (1961) [hereinafter referred to as House Report], indicates that Congress meant § 1391(e) to provide a net that could draw everyone connected with a governmental action into litigation in a particular district. For instance, those who were never government officials but are defendants in a law suit clearly cannot be

[8] We do not focus on a later time, such as the time when a hearing is held or a decision issued, because the statute speaks to the ability to bring an action. Moreover, if a court were not able to determine venue at the time an action is brought, judicial processes could be thrown into chaos by mobile litigants.

reached by § 1391(e).[9] In fact there is a clear indication in the legislative history that Congress did not mean to reach at least those former officials who have moved away from Washington.[10] Therefore, we reverse the district court as to this point and hold that § 1391(e) does not apply to those defendants who, at the time this action was brought, were not serving the government in the capacity in which they performed the acts on which their alleged liability is based.[11]

Personal Damage Actions

The next issue we must face is whether § 1391(e) applies to actions for damages against officials in their individual capacities. Section 1391(e) was passed, together with 28 U.S.C. § 1361, as the Mandamus and Venue Act of 1962. Before 1962 most actions against federal officials could not be brought outside the District of Columbia. Higher officials residing in Washington were usually indispensable parties against whom venue could not be secured except in Washington. Furthermore, such actions

[9] That such defendants may exist is indicated by the 1976 amendment. *See* note 6, *supra*.

[10] "This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." H. Rep. No. 536, 87th Cong., 1st Sess. 2 (1961). Prior to 1962 (when the bill was passed) former officials who had moved away from Washington would not have been subject to suit in Washington.

[11] The act is directed at officials "*acting* . . . under color of legal authority". Since official acts expose the officer to expanded venue, and since we have concluded that this exposure terminates when the official leaves office, it would be anomalous to hold that one of the appellants serving the government in a different capacity is nonetheless still exposed to national venue and service of process. As to the act or omission that exposed him to liability, it is only fortuitous that he is still in government. We need not now decide whether someone who has been promoted in the same department is likewise exempted from the operation of § 1391(e).

were often in the nature of mandamus, and federal district courts outside the District of Columbia lacked subject matter jurisdiction over mandamus actions. The crux of appellants' argument is that § 1391(e) should be narrowly construed as a companion to § 1361, designed to combat the specific, relatively narrow problem that spurred Congress to act. That is, they would have us read § 1391(e) to do no more than supply venue in those suits made possible by § 1361, "suits in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Second Circuit has twice followed similar reasoning, but in cases distinguishable from ours. In *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970), the court said that § 1391(e) was aimed at the mischief posed by the inability to review government action outside Washington and that § 1391(e) reached only those who might be subject to compulsion under § 1361. The holding of the case, however, was that the section did not apply to legislators.[12] The court did not have occasion to decide the kinds of civil actions that could be brought against someone to whom § 1391(e) did apply. In *Natural Resources Defense Council* v. *TVA*, *supra*, 459 F.2d at 255, the court said that §§ 1391(e) and 1361 must be read together, *id.* at 258, and that the literal meaning should not necessarily control, *id.* at 257; but the holding was that § 1391(e)'s venue provisions did not apply to the TVA because another statute controlled venue for actions against the TVA. *Id.* at 259. Section 1391(e) states that it applies "except as otherwise provided by law." The court went on to point out that a suit against the TVA could not have been brought in Washington before 1962. *See* House Report, *supra*, at

[12] We do not indicate our views on this holding. *See* note 17, *infra*.

2.[13] In this case the action, at least as against current officials, could have been brought in Washington.

The weakness of the argument, even apart from the fact that it reflects no clear signal from the legislative history discussed below, is that we must interpret the United States Code as it is written. Congress did not limit the application of § 1391(e) to "actions in the nature of mandamus". Rather Congress used the words "[a] civil action in which each defendant is an officer or employee of the United States . . . acting . . . under color of legal authority." The statute does not, by its terms, limit the kind of civil action to which it applies. The case at bar is a civil action. The complaint alleges that the defendant officers of the United States were acting "under color of legal authority". All elements fit — and we deal with a statute speaking in a highly technical field, venue and jurisdiction, where, if anywhere, precision is required.

The plain language of § 1391(e) covers this case, but again we would go beyond the plain language if the result were absurd or plainly at variance with congressional policies. We conclude, after considering such questions, as have many other courts, that § 1391(e) should cover damage actions against officers in their individual capacities.[14] *See Briggs* v. *Goodwin*, 569 F.2d 1 (D.C. Cir. 1977); *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972);

[13] *See* note 10, *supra*.

[14] The Supreme Court has said that § 1391(e) does not apply to habeas corpus actions, *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n. 4 (1971), but that decision turned on the special nature of habeas corpus actions which though "technically 'civil,' . . . [are] not automatically subject to all the rules governing ordinary civil actions." *See also* the cases cited by the court below. 74 F.R.D. at 391-92.

We might have viewed *Relf* v. *Gasch*, 511 F.2d 804 (D.C. Cir. 1975), as contrary authority, but in *Briggs* v. *Goodwin*, *supra*, 569 F.2d at 6-7, the same circuit confined *Relf's* holding to situations where the alleged wrong was not connected with the defendant's government service.

Driver v. *Helms*, *supra*; *United States* v. *McAninch*, *supra*; *Lowenstein* v. *Rooney*, *supra*; *Patmore* v. *Carlson*, 392 F. Supp. 737, 738 (E.D. Ill. 1975); *Wu* v. *Keeney*, 384 F. Supp. 1161 (D. D.C. 1974); *Green* v. *Laird*, 357 F. Supp. 227 (N.D. Ill. 1973); Hart & Wechsler, The Federal Courts and the Federal System 1388 (1973); 2 Moore, Federal Practice ¶ 4.29, 1210 (1977). *Cf. Kletschka* v. *Driver*, 411 F.2d 436, 442 (2d Cir. 1969) (basing venue on § 1391(b) but adding that § 1391(e) "seems" to apply as well). *But see Kenyatta* v. *Kelly*, 430 F. Supp. 1328, 1330 (E.D. Pa. 1977); *Davis* v. *F.D.I.C.*, 369 F. Supp. 277 (D. Colo. 1974); *Paley* v. *Wolk*, 262 F. Supp. 640 (N.D. Ill. 1965).

The legislative history of § 1391(e) is at best ambiguous, but there are indications that the drafters of the legislation understood that the act might apply to actions such as this one and were not sufficiently bothered by that possibility to prevent it. This act originated as H.R. 10089, 86th Cong., 2d Sess. (1960).[15] That bill was limited to officers acting in their official capacity, and its author, Representative Rudge, explained that it was intended to meet the narrow problem described above. Hearing Before the Committee on the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 2-4 (May 26 and June 2, 1960) [hereinafter cited as Hearings].[16] The hearings on the bill before a subcommittee of the Committee on the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrow purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel, stated, "I think what

[15] H.R. 10089 read, in pertinent part:

> "A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides."

[16] The unpublished transcripts of these hearings were submitted to us by appellants, and appellees have not disputed their authenticity. We have verified the authenticity, accuracy, and availability of these transcripts through the office of the General Counsel to the House of Representatives' Committee on the Judiciary.

this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." *Id.* at 32.

Later in the same hearing Mr. MacGuineas, a representative from the Department of Justice, said he did not understand what the bill was trying to do. "In order to understand that we would have to know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Congressman Dowdy responded, "Maybe we want it to apply to all suits. There is not any particular one. We want it to apply to any one." Congressman Whitener followed that up by saying, "I did not understand there was any doubt." *Id.* at 53-54. One type of suit hypothesized by Mr. MacGuineas was a slander suit against a congressman.[17] Congressman Whitener indicated that he felt the bill should cover such a situation, Hearings, *supra* at 55, and he compared it to a postal worker slapping a housewife as he delivered mail. *Id.* at 58.

The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority" phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official

[17] The Second Circuit has held that § 1391(e) does not apply to legislators, but the holding was based in part on not finding any "word in the five year gestation period of § 1391(e) to suggest that Congress thought it was changing the law not merely with respect to the executive branch but also concerning itself, its officers and its employees." *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970). This issue is not presented to us, and we do not decide it.

capacity or under color of legal authority.' That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." *Id.* at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs.

The Department of Justice expressed reservations about the utility of H.R. 10089 because it was limited to "official actions", and did not expand subject matter jurisdiction. Most actions against government officials, such as those seeking personal damages for acts in excess of official authority, would not be covered by a bill limited to "official capacity". Actions that would be "official", would be equivalent to mandamus actions, and so would still be confined to the District of Columbia for lack of subject matter jurisdiction elsewhere. *See Briggs* v. *Goodwin*, *supra*, 569 F.2d at 4. The new bill, H.R. 12622, 86th Cong., 2d Sess. (1960), met these objections. Section 1 of the bill added a new section, now codified as 28 U.S.C. § 1361, extending mandamus jurisdiction to all district courts.[18] In section 2 of the bill, § 1391(e), Congress included, inter alia, the phrase "under color of legal authority". *See Briggs* v. *Goodwin*, *supra*, 569 F.2d at 4-5.

This bill was reintroduced in the next Congress as H.R. 1960, 87th Cong., 1st Sess. (1961). The Department of Justice, in a letter from then Assistant Attorney General Byron White suggested more changes. The letter recognized that section 2 of the bill, the new § 1391(e) "covers an entirely different subject" than section 1, the new 28 U.S.C. § 1361, and that unless clarified § 1391(e) might

[18] 28 U.S.C. § 1361 reads:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

apply to "suits for money judgments against officers." S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Adm. News 2784, 2789 [hereinafter cited as Senate Report].[19] Though acting on other suggestions from that letter,[20] Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports state, "The venue problem also arises in an action against a Government official seeking damages *from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, *supra*, at 3; Senate Report, *supra*, 1962 U.S. Cong. & Admin. News at 2786 (emphasis added).[21]

In the face of all of this, appellants argue that § 1391(e) was meant to do no more than provide venue in cases to which § 1361 applies, actions in the nature of mandamus brought outside the District of Columbia. In support of this argument they point to language in the legislative history that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on

[19] At minimum this letter demonstrates that Congress was on notice that personal damage actions against government officials were possible, contrary to appellants' argument that due to broad immunity under the doctrine of *Barr* v. *Mateo*, 360 U.S. 564 (1959), and because *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was not yet decided, Congress would not have been thinking of such actions.

[20] For example, the letter suggested that the mandamus jurisdiction section should be limited to actions to compel a duty "owed the plaintiff". The Senate, by amendment adopted this provision, and the House accepted the amendment. *See* note 17, *supra*. *See generally Briggs* v. *Goodwin*, 569 F.2d 1, 5 n. 39 (D.C. Cir. 1977).

[21] This passage undermines appellants' argument that the only damage actions Congress contemplated were actions in the nature of mandamus against an official to recover money allegedly owed to the plaintiff by the United States.

jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report, *supra*, at 1. Appellants also point to the following paragraph of the Report:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority* and not as a private citizen. *Such actions are also in essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is *based upon the fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." *Id.* at 3-4 (emphasis as supplied by appellants).

We do not think that these passages clearly exclude the result that we have reached. Even if we were to acknowledge that the primary purpose of § 1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well. That it does do so and was intended to do so is indicated by the legislative history described above.

Further, unless one were prepared to argue that the 1976 amendment was a mistake, we think it must be taken as a further indication that Congress, whatever its intent at the time it passed § 1391(e), now understands the section to reach personal damage actions. The amendment, note 6, *supra*, allows defendants who are not government officers to be joined in an action with officers when venue as to the officers is asserted under § 1391(e). It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies.

We affirm the district court's holding that § 1391(e) applies to personal damage actions.

PERSONAL JURISDICTION

Appellants' final argument is that § 1391(e)'s service of process provision facilitates the broadened venue provisions, but only if the district in which the suit is brought can establish personal jurisdiction by some other mechanism. In the alternative they argue that even if § 1391(e) broadens personal jurisdiction, it would be unconstitutional to apply it to individuals who lacked the minimum contacts with the state in which the court sits that are required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny.

Appellants state their argument as follows:

> "Nothing in Section 1391 speaks to personal jurisdiction. The statute is entitled 'venue generally' and sets forth in its various sections the rules of venue in civil actions. The statute specifically authorizes only a method of service of process, as distinct from a grant of *in personam* jurisdiction, for the federal officers or agencies within its purview. Indeed, the service of process provision in the statute emphasizes the focus of the statute on review of agency actions and present officials since service is to be made 'to the officer or agency.' The statute addresses only the mechanics of service of process and does not address the exercise of personal jurisdiction. Obviously, it is one thing for an individual to be served the process extraterritorily [*sic*], but quite another for that individual to be subject to the personal jurisdiction of a court in compliance with the Constitutional requirements of due process."[22]

It is true that jurisdiction over the person and service of process are distinguishable, but they are closely related.[23] "[S]ervice of process is the vehicle by which the court may obtain jurisdiction." *Aro Manufacturing Co.* v. *Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965). If Congress, by § 1391(e), authorized service of process beyond the geographical limits that F. R. Civ. P. 4(f) would otherwise impose, and if such service does not violate the Constitution, then service was properly made in this case, and the court properly acquired jurisdiction over the persons of the appellants.

Because appellants are being sued in their individual capacities, they must be served as required by F. R. Civ. P.

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[22] The facts that § 1391(e) was part of "The Mandamus and Venue Act" and that it is codified in a chapter labelled "District Courts; Venue" are factors to consider in determining whether the statute can be used as a basis of personal jurisdiction. They do not overcome, however, the plain language of the statute, which read in the light of the legislative history, *see United States* v. *Culbert*, *supra*, note 7, as set out in the text, indicates that the statute confers personal jurisdiction as well as venue. Moreover, there is not an obviously more appropriate chapter of the code. The chapter entitled "District Courts; Jurisdiction" deals exclusively with subject matter jurisdiction.

[23] The distinction is most important, as an issue of federal practice, in diversity cases. A state long arm statute might authorize extraterritorial service of process that would reach a defendant over whom the state could not constitutionally exercise personal jurisdiction.

4(d)(1), rather than 4(d)(4) or 4(d)(5). That is, a copy of the summons and complaint must be personally delivered. Rule 4(f), however, limits service of process to the territory of the state in which the court is sitting. But Rule 4(f) permits statutory exceptions, and Congress has, in some cases, authorized service of process beyond state boundaries. *See Robertson* v. *Railroad Labor Board,* 268 U.S. 619, 622 (1925); 4 Wright & Miller, Federal Practice and Procedure, § 1125 (1969); Hart & Wechsler, *supra,* at 1106-07. The first question is whether Congress did so in this case.

The second paragraph of § 1391(e) provides that "[t]he summons and complaint . . . shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." Clearly this provision does more than describe the mechanics of service of process. It creates an exception to the general rule by allowing service of process anywhere in the United States by certified mail.

Not only does our reading of the statute command such an interpretation, but we are persuaded that this is precisely what Congress intended. Judge Maris, testifying before the subcommittee as a representative of the Judicial Conference, pointed out that the original bill, H.R. 10089, created a "problem about the acquisition of jurisdiction in personam by the Court in the venue" created by the bill. Hearings, *supra,* at 87. The bill relied on the Federal Rules of Civil Procedure to provide service of process, but Rule 4 would not permit service of process on the individual involved in the suit if that individual were outside the state in which the suit was brought. Judge Maris suggested that the statute provide for broader service:

> "There are statutes which do, like the Antitrust Laws, the Sherman Antitrust Act, under which you can bring a suit against defendants and serve them anywhere in the United States, and of course under the Bankruptcy Act you can serve persons anywhere in the United States.
>
> "Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.
>
> "That would take care of it because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so." Hearings at 88-89.

Congress, following Judge Maris' suggestion, provided nationwide service of process by mail and expected that broadening service would correspondingly broaden personal jurisdiction. Congress recognized that it would serve no purpose to broaden venue without also broadening service of process. House Report, *supra,* at 4. *See Briggs* v. *Goodwin, supra,* 569 F.2d at 7-8. Thus, to the same extent that § 1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction.[24]

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[24] *See Briggs* v. *Goodwin, supra,* 569 F.2d at 8; *Liberation News Service* v. *Eastland,* 426 F.2d 1379, 1382 (2d Cir. 1970) (dictum); *United States* v. *McAninch,* 435 F. Supp. 240, 244 (E.D. N.Y. 1977); *Driver* v. *Helms,* 74 F.R.D. 382, 389 (D. R.I. 1977); *Lowenstein* v. *Rooney,* 401 F. Supp. 952 (E.D. N.Y. 1975); *Crowley* v. *United States,* 388 F. Supp. 981, 987 (E.D. Wis. 1975); *Environmental Defense Fund, Inc.* v. *Froehlke,* 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd,* 477 F.2d 1033 (8th Cir. 1973); *English* v. *Town of Huntington,* 335 F. Supp. 1369, 1373 (E.D. N.Y. 1970); *Macias* v. *Finch,* 324 F. Supp. 1252, 1255 (N.D. Cal. 1970); *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western R.R. Co.,* 290 F. Supp. 612 (D. Colo. 1968), *aff'd,* 411 F.2d 1115 (10th Cir. 1969). *Cf. Ashe* v. *McNamara,* 355 F.2d 277, 279 (1st Cir. 1965).

Having concluded that Congress did create nationwide service of process, we must next decide whether § 1391(e), so interpreted, is constitutional. Appellants argue, and we will assume, that they lack "minimum contacts" with the State of Rhode Island. The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries. The circumscription of state court jurisdiction is a product of boundaries to states' sovereignty.[25] The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind. Whether or not Congress could go so far as to establish only one national district court, *see Briggs* v. *Goodwin, supra*, 569 F.2d at 9, it is clear that Congress could greatly reduce the number of federal districts and draw their boundaries without regard to state boundaries. *See id.*, at 8-10.

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[25] This remains true even after *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). A state boundary is still a significant jurisdictional demarcation because if a defendant is found and served within the state, minimum contacts need not be established, and jurisdiction may be asserted on the basis of the state's sovereignty. We see no reason why the United States does not have the same power over defendants found within its borders. Even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States. *See United States* v. *McAninch*, 435 F. Supp. 240, 244 (E.D. N.Y. 1977).

Appellants argue that the two Supreme Court cases cited above demonstrate that the Court has banished sovereignty as a factor in determining jurisdiction, substituting a test based on "[f]air play and substantial justice [which] are in the main functions of distance." We can think of no case that has made distance a factor in determining minimum contacts. The test to determine whether a defendant may be brought before a state's courts, say the courts of Rhode Island, is no different whether that defendant is found in Connecticut or in Hawaii.

Appellants next argue, with some force, that it would be very unfair and would violate due process to force them, as individuals, to answer suits in districts with which they have no connection and, further, that answering such suits places a burden upon them greater than that carried by a private litigant who would not have to travel to a far-away court—a court which might be far removed from the place where the cause of action arose, and which might have been chosen because the plaintiffs felt the judge would be friendly to their claims. We acknowledge that these appellants may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power "[f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C. § 1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights. Furthermore, we note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

Congress is, of course, limited in the actions it can take by the Due Process Clause of the Fifth Amendment, but application of the Clause is not related to state boundaries. Rather, the requirement is that the nationwide "service required by statute must be reasonably calculated to inform the defendant of the pendency of the proceedings in order that he may take advantage of the opportunity to be heard in his defense." *Mariash* v. *Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). Certainly the certified mail requirement in § 1391(e) meets that standard. Such service is not extra-

territorial for a court of the United States; therefore, the minimum contacts analysis is not relevant. We conclude that national service of process as provided by § 1391(e) is constitutional.[26] *Briggs* v. *Goodwin, supra*, 569 F.2d at 8-10; *United States* v. *McAninch, supra*, 435 F. Supp. at 244; *Driver* v. *Helms, supra*, 74 F.R.D. at 391.

Affirmed in part, reversed in part, and remanded.

[26] The Supreme Court has apparently not decided this precise issue since *International Shoe*. In one case the Court decided not to address the issue. *United States* v. *Scophony Corp.*, 333 U.S. 795, 840 n. 13 (1948).

APPENDIX B

RODNEY DRIVER *et al.*
v.
RICHARD HELMS *et al.*

Civ. A. No. 75-224.

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND.

April 1, 1977.

OPINION

PETTINE, Chief Judge

Plaintiffs are five American citizens who have brought this action on behalf of themselves and all those similarly situated against thirty present and former officials. The amended complaint alleges that the defendants "engaged in an extended conspiracy to conduct an illegal and unconstitutional program surreptitiously to intercept, open, read and photograph tens of thousands of sealed first-class letters deposited in the United States mails by plaintiffs and members of their class", thereby violating plaintiffs' rights under the First, Fourth, Fifth, and Ninth Amendments.[1] Plaintiffs seek declaratory and injunctive relief to operate against Defendant Clarence Kelley, Director of the Federal Bureau of Investigation; damages against each of the other

1. Events giving rise to this lawsuit are described in the Report to the President by the Commission on CIA activities (June 6, 1975) (hereinafter referred to as the "Rockefeller Report"). *See also* Senate Select Committee to Study Governmental Operations with respect to intelligence Activities, Final Report, Book III, 559-679, S.Rep.No.94-755, 94th Cong., 2nd Session (1976) (hereinafter referred to as the Final Report of the Select Committee).

defendants, sued in his individual and official, or former official, capacities; and certain other relief.[2]

Subject matter jurisdiction is invoked under 28 U.S.C. §§ 1331(a), 1339, 1343, 1361, and 5 U.S.C. § 702.

After extensive consultation with the parties, the Court issued an Order setting up a procedure for disposition of the expected deluge of preliminary motions. This Opinion, pursuant to that Order, disposes only of the individual defendants' motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) (lack of jurisdiction over the person), 12(b)(3) (improper venue), and 12(b)(4) (insufficiency of process); of plaintiffs' motion to certify the class; and of the motions to dismiss Clarence Kelley.

Each defendant against whom damages are sought[3] has moved to dismiss for lack of personal jurisdiction and improper venue. Plaintiffs argue that this Court has jurisdiction over the persons of all defendants under 28 U.S.C. § 1391(e) and Rhode Island's long-arm statute, Section 9-5-33, Rhode Island General Laws (1956), as amended, and that venue is proper under 28 U.S.C. § 1391(b) and (e).

Personal Jurisdiction and 28 U.S.C. § 1391(e)

Rule 4(f) of the Federal Rules of Civil Procedures provides for service of a district court's process anywhere within the territorial limits of the state in which the district court is held and, when authorized by a statute of the

2. The United States' motion to intervene as a party-defendant was granted on September 26, 1975. *See Driver* v. *Helms,* 402 F.Supp. 683 (1975) for earlier proceedings in this case. Damages are now sought against the United States directly under 28 U.S.C. § 1331(a). The Court will defer ruling on the pending Motion to Dismiss of the United States and will consider it together with the Motion to Dismiss of defendant U.S. in *Driver* v. *United States,* No. 76-297.

3. Except the United States. *See* note 2, *supra.*

United States, beyond the territorial limits of that state. Each of the defendants was served far outside the territorial limits of Rhode Island; to justify this process, plaintiffs contend that 28 U.S.C. § 1391(e) (1976) is a statute authorizing such national service of process in damage actions against present and former government officials acting under color of legal authority.

As plaintiffs point out, prior to the passage of § 1391(e) in 1962, citizens were unable to obtain effective relief for claims against federal officials arising from violations of federal law. Rule 4(f), F.R. Civ. P., prevented the federal courts from exercising personal jurisdiction over non-resident federal officials. And even if jurisdiction could be acquired pursuant to state law (long-arm statutes were just coming into general use at the time), venue in a federal question action would only lie in the district where all the defendants resided. *Compare* 28 U.S.C. § 1391(b) (1962 ed.) (venue where all defendants reside) with 28 U.S.C. § 1391(b) (Supp. 1975) (adding venue "in the judicial district . . . in which the claim arose"). Thus, in cases where plaintiff's claim arose from the joint acts of federal officials who resided in different districts, citizens were forced to file separate suits against the defendants in the districts where they resided. In cases where a superior federal officer residing in Washington, D.C. was an "indispensable" party to an action, citizens were only able to litigate the claim in the District of Columbia, and were unable therefore to join a subordinate officer residing elsewhere who was equally necessary to the action. *See generally* 4 Wright and Miller, Federal Practice and Procedure: Civil § 1107, at 417, (1969 ed. Supp. 1976); 2 J. Moore, Federal Practice § 4.29, at 1209 (2d ed. 1975).

As a result of these obstacles, litigation against federal officials for redress of statutory and constitutional rights

was "too expensive and inconvenient for many plaintiffs". Hart and Wechsler, The Federal Courts and the Federal System 1386 (1973).

To eliminate at least some of these obstacles and to enable citizens to obtain relief against official wrongdoing effectively, conveniently, efficiently, economically, and fairly, § 1391(e) was enacted in 1962. As the Senate Report stated, the purpose of the statute was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government". S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962). Section 1391(e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action was brought. [4]

4. Sec. 1391(e) was enacted as part of the Mandamus and Venue Act of 1962. The legislative history is contained in H.R.Rep.No. 536, 87th Cong., 1st Sess. (1961) [hereinafter H.Rep.]; S.Rep.No.1992, 87th Cong., 2d Sess. (1962), reprinted in 1962 *U. S. Code Cong. and Adm. News*, pp. 2785-2786 [hereinafter S. Rep.]
The Act of October 21, 1976, Pub.L. 94-574, § 3, amended § 1391 (e), adding after the last sentence of the first paragraph the following:

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

This amendment was intended only to overrule the holdings of some courts that § 1391 was inapplicable when there were any non-federal defendants. *See* 105 Cong.Rec. S11352 (daily ed. July 1, 1976), *citing Natural Resources Defense Council* v. *TVA*, 459 F.2d 255, 257 n. 3 (2d Cir. 1972). Having examined the legislative history of this amendment to § 1391(e), the Court does not believe that it in any way affects the conclusions here reached.

The defendants argue that § 1391(e)(1) does not supply personal jurisdiction (2) does not apply in actions for damages, (3) does not apply to officials sued in their "individual" capacity, and (4) does not apply to former federal officials. The Court turns to each of these arguments.

1. § 1391(e) supplies personal jurisdiction

[1] This Court is of the firm opinion that § 1391(e) is indeed a statute authorizing nationwide jurisdiction which would be otherwise unavailable to a federal court bound by Rule 4(d). This opinion is shared by the great majority of courts, and all of the commentators, which have considered the question. And the legislative history of § 1391(e), while not a model of clarity, amply supports the Court's conclusion.

The House Committee Report accompanying § 1391(e) states:

> In order to give effect to the broadened venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in

> which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed tc make a Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought.

H. Rep No. 536, 87th Cong., 2d Sess., at 4 (1962). Professor Moore agrees that subsection (e) both expands venue and extends the area in which the district court's process will run:

> [Sec. 1391(e)] realistically broadens venue in any civil action (not just mandamus proceedings) where each defendant is a federal officer, employee or agency and is sued for acts done in his official capacity or under color of legal authority; and provides for extraterritorial service of process, if necessary, in such an action. 2 J. Moore, Federal Practice, § 4.29, 1210 (2d ed. 1975).

Accord, 4 Wright and Miller, Federal Practice and Procedure, Civil § 1107 (1969 ed., Supp.1975).

The Second Circuit has stated that where § 1391(e) is applicable, it supplies both venue and *in personam* jurisdiction. *Liberation News Service* v. *Eastland,* 426 F.2d 1379 (2d Cir. 1970) (dicta). *Accord, Lowenstein* v. *Rooney,* 401 F.Supp. 952, 961-962 (S.D.N.Y. 1975); *Crowley* v. *United States,* 388 F.Supp. 981, 987 (E.D. Wis. 1975); *Environmental Defense Fund, Inc.* v. *Froehlke,* 348 F.Supp. 338, 364 (W.D.Mo.1972), *aff'd on other grounds,* 477 F.2d 1033 (8th Cir. 1973); *English* v. *Town of Huntington,* 335 F.Supp. 1369, 1373 (E.D.N.Y. 1970); *Macias* v. *Finch,* 324 F.Supp. 1252, 1254-1255 (N.D. Cal.

1970); *Brotherhood of Locomotive Engineers* v. *Denver and R.G.W.R. Co.,* 290 F.Supp. 612, 615-616 (D.Colo. 1968), *aff'd* 411 F.2d 1115 (10th Cir. 1969); *Powelton Civic Home Owners Ass'n* v. *Department of Housing and Urban Renewal,* 284 F.Supp. 809, 834 (E.D.Pa.1968). *See also Relf* v. *Gasch,* 167 U.S.App.D.C. 238,511 F.2d 804, 808 (Robb, J., concurring).

Defendants argue that § 1391(e) speaks only to service of process, not to the exercise of personal jurisdiction, which they contend must be otherwise acquired. Typical of this line of argument is the following passage from the brief of Defendants Colby, Schlesinger, Cushman, and Walters, which the Court finds necessary to quote from at length:

> The distinction between the mechanics of service of process and whether service is effective to confer personal jurisdiction is elementary and clear. Plaintiffs appear to treat the two together without an appreciation of the fact that two very different concepts are involved.
>
> "Although Rule 4 [of the Federal Rules of Civil Procedure] is concerned with defining the various acceptable methods for effecting service of process, its operation cannot be understood without an appreciation of the history and current status of the law relating to the personal jurisdiction of the courts. This is true because underlying the question of service of process is the preliminary inquiry into whether the court has the power to summon a defendant before it to adjudicate a claim against him. * * * Rule 4 does not speak to this subject, which at present is governed primarily by the Supreme Court's interpretation of the Due Process Clause of the Constitution and the network of state and federal statutory provisions." 4 Wright and Miller, *Federal Practice and Procedure* (1969) at pp. 205-206.

Stated simply, the second paragraph of Section 1391(e) provides that in cases which fall within its scope, that is when jurisdiction is already present and venue is conferred by the first paragraph of Section 1391(e), the mechanics of service of process shall be "as provided by the Federal Rules of Civil Procedure" except those mechanics are modified to the extent that "delivery of the summons and complaint [under Rule 4(d)(5)] may be made by certified mail beyond the territorial limits of the district in which the action is brought". Such a modification of the method of service of process under the Federal Rules does not answer, as plaintiffs would have this Court believe, the "preliminary inquiry into whether the Court has the power to summon a defendant before it to adjudicate a claim against him". 4. Wright and Miller, *supra,* at p. 205.

> Not at all dissimilar this scheme is the operation of state service of process provisions such as the Rhode Island rules. Service of process is permitted by mail beyond the territorial limits of the Rhode Island courts, R.I.C.P., Rule 4(e), but this alone does not confer jurisdiction since before a defendant is amenable to such service and thereby subject to the jurisdiction of Rhode Island, he must have the "necessary contacts" with Rhode Island.

[2] By applying to § 1391(e), analysis germaine to jurisdiction under Rule 4, F.R. Civ.P. the defendants completely misperceive the nature of the problem at hand, and rely on an inapposite line of cases, *e.g., Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 228, 2 L.Ed.2d 1283 (1958); *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Company* v. *State of Washington.* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1954). For

those cases in which Congress has decided that the jurisdiction of federal courts shall be coextensive with the jurisdiction of the states in which they sit (that is, all cases directly ruled by Rule 4(d)), minimum contacts analysis is indeed in order. State courts may exercise jurisdiction only over defendants within their territory or over defendants who are deemed present within the territory by virtue of purposeful activity which constitutes such minimum contacts. *International Shoe, supra.*

[3] However, Congress may provide for national service of process, i.e., national exercise of personal jurisdiction by each of the district courts based on presence of the defandant in the United States, rather than in any particular state. *Robertson* v. *Railroad Labor Board,* 268 U.S. 619, 45 S.Ct. 621, 69 L.Ed. 1119 (1925). *See Hart and Wechsler, supra,* at 1106. When Congress does so provide,[5] the district court's service is not constrained by the due process (*International Shoe, Hanson* v. *Denckla*) limits to which state courts are subject. *See Mariash* v. *Morrill,* 496 F.2d 1138, 1142-43 (2d Cir. 1974). Instead, the due process limitation on national service of process is found by inquiring into the fairness of such jurisdiction in the particular circumstances and facts of the case at hand, an inquiry mandated by the Fifth Amendment Due Process Clause. *Mariash* v. *Morrill, supra,* at 1142-43; *see also Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191, 198-205 (E.D.Pa. 1974). *Cf. International Shoe, supra,* 326 U.S. at 320, 66 S.Ct. 154.

[4, 5] The Court believes that the exercise of national personal jurisdiction pursuant to § 1391(e) here is consistent with the applicable due process test. In *Mariash* v.

5. For a partial list of other statutes which authorized federal courts to exercise national *in personam* jurisdiction, see 2 J. Moore, Federal Practice par. 433 at 1242 (2d ed. 1975); id. par. 4.42(i), at 1293.8-1293.10.

Morrill, supra, the Second Circuit held that Congressionally authorized national jurisdiction satisfied due process if it was based on service calculated to inform the defendant of the proceedings in order that he may take advantage of the opportunity to be heard. As Chief Judge Kaufman noted, speaking for a panel including Associate Justice Clark, nationwide service of process, when authorized by Congress, is not extra-territorial at all. Therefore, the due process limitation on such process should be precisely the limitations applicable on a state's process within its territorial limits: notice calculated to inform the defendant of the pendency of the suit. *Mullane* v. *Central Hanover Bank and Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).[6] Since it is undisputed that each of the defendants has been served according to the statute, and that such notice informed each defendant of the pendency of this suit so as to enable them

6. Extra-territorial service of process must be based on necessary minimum contacts to satisfy due process. *International Shoe Company* v. *State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In *Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D.Pa.1974), the court went further, holding that the due process limits on *national* service of process should be governed by a five-part fairness test, incorporating a minimum contacts test. But *Oxford First* relied primarily on *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972), which had required a showing of minimum contacts only because it was a true case of *extra-territorial service* of nationwide process—service under the Securities Act of 1934 on a foreign citizen living abroad. *See* the Second Circuit's explanation of *Leasco* in *Mariash* v. *Morrill,* 496 F.2d 1138, 1143 n. 9. For that reason, it was necessary to determine whether those citizens had the necessary "minimum contacts" with the United States. Thus the *Oxford First* court seems to have proceeded on an incorrect premise; as Chief Judge Kaufman has made clear. Congressionally authorized nationwide service (as opposed to extra-territorial service) must meet only the requirements of *Mullane* v. *Central Hanover Bank and Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), not those of *International Shoe, supra. See Mariash* v. *Morrill,* 496 F.2d 1138, 1143 n. 9.

to take advantage of the opportunity to be heard, the Court finds that the service effected comports with Due Process.

Defendants attempt to buttress their argument that § 1391(e) authorizes service only where *in personam* jurisdiction is otherwise acquired through minimum contacts by relying primarily on *Schlanger* v. *Seamans,* 401 U.S. 487, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971), *Strait* v. *Laird,* 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972), *Smith* v. *Campbell,* 450 F.2d 829 (9th Cir. 1971) and *Carney* v. *Laird,* 326 F.Supp. 741 (D.R.I. 1971), *aff'd,* 462 F.2d 606 (1st Cir. 1972). The Court finds these cases inapposite.

In *Schlanger* v. *Seamans, supra,* the Supreme Court held that an Arizona federal court was without jurisdiction to entertain a habeas corpus petition of an enlisted man in the Air Force who, although temporarily in Arizona, was under the custody of officials at Moody Air Force Base in Georgia.

The Court's rationale was simply that § 1391(e) did not apply to habeas corpus actions. The Court qualified its holding that jurisdiction over respondents in habeas corpus actions was territorial by observing:

> Although by 28 U.S.C. § 1391(e) (1964 Ed., Supp. V), Congress has provided for nationwide service of process in a "civil action in which each defendant is an officer or employee of the United States," the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. . . . Though habeas corpus is technically "civil", it is not automatically subject to all the rules governing ordinary civil actions. (citations omitted) 401 U.S. at 490 n. 4, 91 S.Ct. at 997.

Section 1391(e) applies to actions against government officers "except as otherwise provided by law". The Court found in *Schlanger* that the habeas corpus statute, 28 U.S.C. § 2241, did indeed provide otherwise. Therefore,

§ 1391(e) did not apply, and a district court's reach of *in personam* jurisdiction in habeas corpus actions was limited to the traditional territorial jurisdiction of the district courts.

The other habeas corpus decisions cited by the defendants follow from the rule established in *Schlanger, supra,* and establish only the proposition that § 1391(e) is unavailable to establish personal jurisdiction in habeas corpus actions. *See* 4 Wright and Miller, Federal Practice and Procedure, § 1107, at 89 (Supp. 1975). In *Strait* v. *Laird, supra,* the Court held that the territorial jurisdiction of the district court for habeas corpus actions could be justified by using the respondent's minimum contacts in the district to impute his presence there. The Court did not find it appropriate to cite or discuss § 1391(e) at all, basing its decision on its interpretation of 28 U.S.C. § 2241. In *Carney* v. *Laird, supra,* this Court relied on *Schlanger,* holding that § 1391(e) did not extend the habeas corpus jurisdiction of the district courts. That opinion did not consider, much less decide, whether § 1391(e) authorized the exercise of *in personam* jurisdiction beyond the limits provided by Rhode Island's long-arm statute in civil actions other than habeas corpus. *Carney* v. *Laird, supra,* at 744.

Smith v. *Campbell, supra,* cited by many of the defendants, appears to support their contention that § 1391(e) is unavailable to ground personal jurisdiction in civil actions.[7] However, *Smith* too was a habeas corpus action, relying on the rule of *Schlanger* v. *Semans.* The dicta so heavily relied on by defendants appears to have exactly the same meaning as this Court's observations in *Carney* v. *Laird, supra.* To the extent that the Ninth Circuit meant

7. "Section 1391 may not be utilized to confer jurisdiction, but can be in order to effectuate jurisdiction once it has attached." 450 F.2d at 834.

to generalize its position to civil actions other than habeas corpus, this Court is in disagreement, and respectfully declines to follow.

2. *Section 1391(e) applies to damage actions*

Defendants make two related claims which bear on the question whether the liberalized terms for securing personal jurisdiction under § 1391(e) can be invoked in actions for damages against current federal officials. First, they argue that § 1391(e) pertains only to actions in the nature of mandamus against government employees under 28 U.S.C. § 1361. Second, they contend that § 1391(e) does not apply to defendants sued in their "individual" capacities. The Court will consider each of these arguments in turn.

a. *Section 1391(e) applies to damages actions as well as mandamus actions.*

[6] Section 1391(e), by its terms applies to any civil action in which "a defendant is an officer or employee of the United States . . . acting in his official capacity or under color of legal authority". On its face, then, § 1391(e) covers far more than mandamus actions. However, the Supreme Court has held that habeas corpus actions do not fall within § 1391(e), *Schlanger* v. *Seamans, supra,* 401 U.S. at 490 n. 4, 91 S.Ct. 995 and this Court must decide whether the subsection is inapplicable to damage actions as well.

Defendants rely on the legislative history of § 1391(e) for their argument that Congress meant to restrict its application to mandamus actions. There is no doubt that the legislative history can be read to support such a position. However, the Court believes that properly read the legislative history makes it clear that § 1391(e) refers to damage actions as well as mandamus actions.

At the outset, the Court wishes to emphasize what should be apparent. If Congress wanted to limit the application of § 1391(e) to mandamus actions, the statutory language it chose was extraordinary ill-fitted to that task. The subsection applies to "a civil action in which [each] defendant is an officer . . .", not to "any action in the nature of mandamus . . ." which was the language Congress used in 28 U.S.C. § 1361, a statute passed together with § 1391(e). Congress has demonstrated its ample ability to distinguish between civil actions in general and mandamus actions in particular, and this Court believes that the legislative history contradicting the plain meaning of the subsection would have to be unusually clear and persuasive to warrant adoption of a reading which a) is opposed to the plain meaning of the words of the subsection, and b) attributes such carelessness to Congress. The Court therefore turns to the legislative history, and to an attempt to discern "the mischief" at which § 1391(e) was directed.

The Mandamus and Venue Act of 1962 contained two "entirely different subjects",[8] accordingly to then-Deputy

8. There is clearly a contradiction between the recognition by the Department of Justice that §§ 1361 and 1391(e) covered "entirely different subject[s]" and Judge Friendly's admonition that §§ 1361 and 1391(e) must be read together. *See Natural Resources Defense Council* v. *TVA*, 459 F.2d 255, 258 (2d Cir. 1972). Defendants rely on Judge Friendly's dictum to argue that § 1391(e) only authorizes service and jurisdiction in actions made possible by § 1361—that is, mandamus actions. As the House Report states,

> this bill is not intended to give access to the federal court to an action which cannot now be brought against a federal official in the United States District Court for the District of Columbia.

H.Rep.No.536, 87th Cong., 2d Sess., at 2. However, for reasons stated below in the text, this Court finds the language of the House Report refers only to the subject matter jurisdiction conferred in Section 1 of the bill, which became § 1361. *See also* Cramton, Nonstatutory Review of Federal Administrative Action, 68 Mich.L.Rev. 387, 453 (1970), and *infra* n. 10.

Attorney General Byron R. White, whose letter so stating to Senator Eastland, Chairman of the Senate Judiciary Committee, appears in the official legislative history. *See* U.S. Code Cong. and Adm.News, 87th Cong., 2nd Sess., at 2789 (1962). First in what is now 28 U.S.C. § 1361, Congress facilitated review of administrative actions by abrogating the ancient rule by which only the district court for the District of Columbia had jurisdiction to mandamus federal officers. *See Liberation News Service* v. *Eastland*, *supra* at 1383. As Judge Friendly has noted "this jurisdictional change . . . became the main subject of Congressional and executive concern". *Id.* Second, in what became 28 U.S.C. § 1391(e), Congress authorized broadened venue and national service of process in civil actions against employees of the United States "acting in . . . official capacity or under color of legal authority". S.Rep. No. 1992, 1962 U.S. Code Cong. and Adm.News, *supra*, at 2786.

The presence of these two separate subjects accounts for the difficulties caused by the legislative history, which makes sense only on the understanding that § 1391(e), but not § 1361, extends beyond mandamus actions. Both the House and Senate Reports contain the following paragraph, in identical words:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty.
>
> H.Rep. at 3; S.Rep. at 3.

Hart and Wechsler, supra, at 1388, say that "A literal reading of the statutory language would make the section applicable to all types of 'civil actions' against federal

officers, and that is precisely how most courts have construed § 1391(e)". Professor Moore agrees:

> . . . [Sec. 1391(e)] realistically broadens venue in any civil action (not just mandamus proceedings) where each defendant is a federal officer, employee, or agency and is sued for acts done in his official capacity or under color of legal authority; and provides for extraterritorial service of process, if necessary, in such an action.

2 Moore, Federal Practice, paragraph 4.29, 1210 (2d ed. 1971)

As plaintiffs demonstrate, numerous courts have applied the statute to a variety of settings where the complaint sought monetary relief for the violation of constitutional rights. In *Ellingburg* v. *Connett,* 457 F.2d 240, 241 (5th Cir. 1972), the Fifth Circuit held that § 1391(e) applies to a damage action by a federal prisoner against prison officials for unconstitutional treatment. *See also Patmore* v. *Carlson,* 392 F.Supp. 737, 739-740 (E.D.Ill.1975). In *Lowenstein* v. *Rooney,* 401 F.Supp. 952 (S.D.N.Y.1975), the court applied § 1391(e) to a damage claim against present and former officials for violating plaintiff's constitutional rights. In *Briggs* v. *Goodwin,* 384 F.Supp. 1228, 1230 (D.D.C.1974), the court applied § 1391(e) to a damage action arising out of the unlawful conduct of federal prosecutors in a criminal case. *Wu* v. *Keeney,* 384 F.Supp. 1161 (D.D.C.1974) and *Green* v. *Laird,* 357 F.Supp. 227 (N.D.Ill.1973) also recognized the applicability of § 1391(e) to damage actions.[9]

9. While some of the above-cited cases fail directly to address the issue, in each of them a close reading makes it clear that the court of necessity relied on § 1391(e) to ground at least venue, and usually jurisdiction as well, in a damage action. This Court rejects the suggestion of some defendants that this authority is worthless by virtue of those courts' failure to focus in on the problem, at least where so many courts made the same "mistake" and where each of the defendants was presumably represented by counsel from the Department of Justice, who would have been alerted to § 1391(e)'s potential for reaching damage actions from the outset. *See* fn. 22, *infra.*

See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 Georgetown L.J. 19, 36-37 (§ 1391(e) applicable to damage suits against officers acting under color of legal authority); Cramton, Nonstatutory Review of Federal Administrative Action, 68 Mich.L. Rev. 387; 455 (1970) (same).[10]

Against this strong authority, defendants make a series of arguments based primarily on the fact that § 1391(e) was passed jointly with the Mandamus Act, 28 U.S.C. § 1361. They rely on the following language in the legislative history:

> The purpose of this bill, as amended, is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia.
>
> This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia. S.Rep.1992, *supra,* at 2; 1962 U.S. Code Cong. and Adm.News, *supra,* at 2784-85.

Since the present action was not cognizable only in the District of Columbia prior to the passage of the Mandamus and Venue Act of 1962, the argument goes, the statute cannot encompass this claim.

10. The Court notes that Dean Cramton has been publicly recognized by the Senate as the craftsman of the revisions of § 1391(e). *See* 105 Cong.Rec. S11532 (daily ed. July 1, 1976). His views are therefore of considerable weight and importance.

There are a number of crucial errors in this line of reasoning.

First, the defendants argue that this action could have been brought in any district "where the claim arose", and for that further reason is not an action which could only have been brought in the District of Columbia before passage of Section 1391(e). However, as plaintiffs observe, that venue provision did not exist until 1966, when 28 U.S.C. § 1391(b) was amended. Moreover § 1391(e)(1) provides venue in the district where *one* of the defendants resides. If the defendants may reside in more than one district, then all the defendants need not reside in the District of Columbia. Thus, subsection (e)(1) contemplates actions against individuals who do not reside in the District of Columbia and therefore could not have been sued there prior to the enactment of § 1391(e).

A close reading of the legislative history convinces the Court that the language cited by defendants was addressed not to the entire bill but solely to the mandamus section. In his letter to Senator Eastland, then-Deputy Attorney General White expressed the concern of the Justice Department that the act might be construed to extend the mandamus power to instances where there was no clear legal duty.

> Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. S. Rep., *supra*, at 6; 1962 U.S. Code Cong. and Adm. News, *supra*, at 2788.

In response to this concern, the Senate Committee added clarifying language to § 1361, and inserted in its Report the above-cited language, limiting the new mandamus sub-

ject-matter jurisdiction of the district courts to the power which had previously existed in the District of Columbia. This limitation was not addressed to that part of the bill which became 28 U.S.C. § 1391(e).

It is noteworthy that the Deputy Attorney General's letter had gone on to suggest tying section 2 of the bill, (now § 1391(e)), to the Administrative Procedure Act, to

> ". . . unquestionably eliminate[s] suits for money judgments against officers . . ." S. Rep 1992, *supra*, at 6; U.S. Code Cong. and Adm. News, *supra*, at 2789.

Although Congress adopted White's other suggestions it refused to act on this one. While such Congressional inaction is of course not dispositive, the fact that Congress was made aware of the construction which § 1391(e) invited is telling. The Court finds this additional support for its conclusion that the statements in each Report, that the venue and jurisdictional problem of suing federal officers for damages would be solved by § 1391(e), indeed say what they seem to say.

In summary, the legislative history clearly states that the venue provisions were intended to overturn the decisions by which citizens seeking relief against government officials were forced to sue in Washington, D.C. by virtue of the the then-operative federal question venue statute (venue was available only where all defendants resided) [11] and the indispensable party rule (even where the defendant official was in plaintiff's local district, a superior officer in

11. Since venue in federal question cases at the time § 1391(e) was passed was available only where defendants resided, *see supra* at 2, the great majority of the defendants here could have been sued only in Washington, D.C. under that former venue statute. Therefore, if Congress intended § 1391(e) to apply only to actions which, at the time of its passage, could be brought in Washington, D.C., many of the pending motions to dismiss would still have to be denied.

Washington found indispensable would defeat the action, since venue would be improper in the home district.) *See* S.Rep., *supra* at 2-3, U.S.Code Cong. and Adm. News, *supra*, at 2786. *See also* 4 Wright and Miller § 1107, *supra* at 419-420. The same history specifically includes damage actions in the catalogue of "mischiefs" to be remedied. It is therefore not surprising that defendants have not cited a single case which holds that § 1391(e) is inapplicable to damage actions.[12]

The Court can only conclude, therefore, that § 1391(e) does indeed apply to damage actions. Whether it applies to actions seeking damages against officials as individuals, and where those officials are *former* employees, remain to be considered.

b. *Section 1391(e) applies to defendants sued in their "individual" capacities for actions accomplished under color of legal authority.*

[7] All the defendants to whom the plaintiffs look to recover money damages for the violation of their constitutional rights, are sued in their "individual" capacity, and also in their "official" or "former official" capacity, as the case may be (depending on whether they are or are not now in government employ). But it is the "individual" capacity which allows recovery of money damages. That designation satisfies the fiction which was first adopted in ***Ex Parte Young***, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in order to overcome the impediment of sovereign immunity. Its purpose is to characterize the illegal or unconstitutional acts of government officials done under color of legal authority (i.e., in the course of employment), as their own for

12. Defendants do cite authority that § 1391(e) is inapplicable to damage actions brought against defendants individually. *See* part 2(b), *infra*.

which they may incur liability. As it was specifically put in *Ex Parte Young:*

> If the act which the [official] seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such an enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. 209 U.S. at 159-60, 28 S.Ct. at 454 (emphasis added).[13]

Acknowledgement of the fiction, and its function, is explicitly contained in § 1391(e) which uses the language "under color of legal authority".[14]

The House Committee Report explained the significance of the phrase (H.R.Rep. pp. 3-4):

> By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the

13. Though *Ex Parte Young* was an action to enjoin a state official, the fiction has been transported to apply to federal officials, *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), and to actions for money damages. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (state officials); *Bivens* v. *Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (federal officials).

14. The phrase was inserted over the objection of the Justice Department, which argued for the statute's limitation to acts done in an official capacity. Jacoby, *Nonstatutory Judicial Review*, 53 Geo.L.J. 19, 32-33 (1964).

> United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity. Considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned. *Id.* at 3—4.

Defendants agree that damages can be awarded against them only in their individual capacities. However, they contend that § 1391(e) does not authorize jurisdiction or venue in damage suits against federal officers sued in their individual capacities, citing *Relf* v. *Gasch*, 167 U.S.App.D.C. 238, 511 F.2d 804, 807 n. 15 (1975) and *Paley* v. *Wolk*, 262 F.Supp. 640, 643 (N.D.Ill.1965), *cert. denied*, 386 U.S. 963, 87 S.Ct. 1031, 18 L.Ed.2d 112 (1967).

In *Relf* v. *Gasch, supra,* plaintiffs sought to mandamus a district judge in the District of Columbia to prevent a transfer of a lawsuit from Washington, D.C. to Alabama. The underlying suit was against federal officials residing in Washington. The Court of Appeals granted the mandamus, finding that venue would not exist in Alabama under § 1391(e), by holding that § 1391(e) was inapplicable where damages were sought against defendants as individuals. The only authority the Court gave for this proposition was *Paley* v. *Wolk, supra.*

In *Paley* v. *Wolk, supra,* plaintiff claimed that federal patent officers were involved in a "confidence game" to pocket plaintiff's patent application fees. The court concluded that the action arose out of essentially private acts for

private gain, that the wrongful acts were not done in the course of the defendant's duties, and that § 1391(e) did therefore not apply. 262 F.Supp. at 643.

With due respect, this Court believes that the *Relf* decision is insupportable in light of the language of § 1391(e), the legislative intent discussed *supra,* and the *Paley* case. *Paley* simply tracks the language of § 1391(e), holding that the subsection is available only when acts complained of are performed "under color of legal authority". The acts complained of in *Paley* were found not to be performed "under color of legal authority". In *Relf, however,* as here, it is clear that plaintiffs were complaining of precisely such acts as are covered by the terms of § 1391(e). See Hart and Wechsler, *supra,* at 1388; S.Rep., *supra,* at 3. Contrary to defendants' contentions and *Relf*, § 1391(e) does not exclude all damage actions against officers sued individually. It excludes damage actions against officers sued individually when those acts are not accomplished under color of legal authority—i. e., when the acts complained of are private acts accomplished for private gain.[15] This reading fully conforms to the congressional intention in passing § 1391(e), which was to facilitate suits seeking redress against the misuse of governmental power.

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15. *See, e.g., Griffith* v. *Nixon,* 518 F.2d 1195 (2d Cir. 1975), dismissed for lack of jurisdiction because the acts complained of were, like those in *Paley* v. *Wolk, supra,* private acts done for private gain. This distinction is made in other areas of the law relating to public officials. *See, e.g., United States* v. *Ehrlichman* 546 F.2d 910, 921 (D.C.Cir.1976) where the court stated:

> There is no violation of Section 242 [42 U.S.C. § 242], however, if a sheriff and his deputies commit a murder for purely personal, non-governmental reasons. The state can, and should, deal with such crime. Section 242 comes into play only if the object of the murder . . . [arose from some] purpose stemming from the official position of those committing the homicide.

Under the defendants' theory, the portions of the Senate and House reports which specifically place damage actions within the reach of § 1391(e) are meaningless.[16] The only actions they believe that language contemplates are actions

> such as those against tax collectors which are against the government official in his "personal" capacity, not his official capacity . . . since otherwise they would be barred by the doctrine of sovereign immunity.

Reply memorandum of defendants Colby, Schlesinger, Cushman and Walters, at 10. However, the legislative history specifically removes actions against tax collectors from the reach of § 1391(e):

> The committee also approved an amendment to section 2 of the bill providing that the provision with respect to venue should apply only to the extent that is not otherwise provided by law. Examples of such proceedings covered by this provision are proceedings with respect to federal taxes.

S.Rep.No.1992, *supra*, 4; U.S.Code Cong. and Adm.News, *supra*, at 2787. Defendants have not suggested damage actions other than the clearly-excluded tax refund actions to which Congress might have been addressing itself.

In essence, defendants attempt to break down the fiction which authorizes both injunctive relief and damages against federal officers when such relief would not be available against the United States. As Defendant Helms puts it:

16. "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."

H.Rep.No.536, 87th Cong., 1st Sess., at 3; S.Rep.No.1992, 87th Cong., 2nd Sess., at 3.

> Plaintiffs would have this Court believe that a suit against a defendant "individually" is the *equivalent* of a suit against that defendant for actions "under color of legal authority." This contention defies common sense and English usage. Plaintiffs themselves admit that Section 1391(e) covers only suits which would otherwise be unconsented suits against the sovereign, but which are maintainable against Federal officials as nominal defendants through a "fiction". But, a suit against a former officer, seeking damages from his personal estate, is the very antithesis of a suit against the Government. Thus Plaintiffs' own analysis of Section 1391(e) proves the inapplicability of the provision here.

To the contrary, permitting damage suits against officers "individually" for harm resulting from actions accomplished under color of the government's legal authority tracks precisely the methodology adopted in *Ex Parte Young, supra,* and subsequent cases. Such suits enable citizens to remedy harms to them and to deter government officials in the future from misusing the legal authority entrusted to them. The legislative history of § 1391(e) is replete with reference to precisely these concerns. The result is not inequitable. If defendants can establish a good-faith defense, it will be available to them. However, should they be unable to establish such a defense, it would be a serious injustice to throw up hurdles against a lawsuit in a single, convenient forum which Congress has authorized as a "readily available, inexpensive judicial remed[y] for the citizen who is aggrieved by the workings of government" S.Rep.1992, *supra*, at 3.[17]

17. Defendant Cotter argues that there is no need to look to the legislative history of § 1391(e) because the statute is clear on its face. He contends that resort to the legislative history, and an attempt to construe the subsection in light of Congressional intent, is particu-

3. *Section 1391(e) Applies to Former Officials*

[8] As a critical portion of their argument to avoid the Court's jurisdiction, defendants who were employed by the United States in the past, but who were no longer employed by the United States at the time they were served with process in this suit,[18] maintain that § 1391(e) does not apply to former federal officials but only to officials who were employed by the United States at the time they were served with process in this suit. The arguments they make persuaded Judge Renfrew, in a similar case involving many of the same defendants, to hold that § 1391(e) applied solely to present, not former, officials. *Kipperman* v. *Mc Cone,* 422 F.Supp. 860, 876-77 (N.D.Cal.1976).

Judge Renfrew began by noting that the plain language of the statute denotes "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority." The court then proceeded to the legislative history which it found decisive, suggesting "no intent on the part of Congress to include former officials among those subject to suit under Section 1391(e)". *Id.* at 876. As Judge Renfrew read the legislative history, only those individuals subject to mandamus—present officials—would fall within the scope of the subsection. He found it "inconceivable that Congress would so substantially broaden the venue provision applicable to every individual once employed by the federal government without comment". *Id.,* at 877.[19]

larly inappropriate since the "literal" reading he offers will, he asserts, leave plaintiff with appropriate forums for this lawsuit in the Southern District of New York, the site of the mail openings, and the Eastern District of Virginia, headquarters of the CIA. Whether or not jurisdiction over all defendants would exist in those forums now, it is relevant in deciding what Congress intended by passing § 1391(e), that when § 1391(e) was enacted, this lawsuit could not have been brought in either of them. *See* 28 U.S.C. § 1391(b) (1962 ed.). Although courts have disagreed about the proper construction of § 1391(e), they have been virtually unanimous in agreeing that the statute is not clear on its face, and required a resort to legislative history. *See e.g., Natural Resources Defense Council* v. *TVA,* 459 F.2d 255, 257-59 (2d Cir. 1972); *Powelton Civil Home Own. Ass'n.* v. *Department of Housing and Urban Development,* 284 F.Supp. 809, 833 (1968).

18. Those defendants are Raborn, Carter, Taylor, White, Bissell, Karamessines, Angleton, Hood, Rocca, Osborn, Murphy, Day, O'Brien, Watson, Blount, Klassen, Cotter, Gray, Mitchell, Bundy, and O'Brien. Defendant Kirkpatrick is a former official but is a resident of Rhode Island. Defendants Helms, Schlessinger, Colby, Meyer, Ober, Walters and Kelley are, or were at the time they were served, employees of the United States.

The *Kipperman* court's decision regarding the reach of § 1391(e) is squarely in conflict with the decision in *Lowenstein* v. *Rooney,* 401 F.Supp. 952 (S.D.N.Y.1975). Lowenstein sought declaratory and injunctive relief and damages from various present and former officials for their alleged improper and unlawful conduct toward him, consisting of, *inter alia,* improper investigations, and a politically motivated IRS investigation. In response to the motions of various defendants to dismiss because § 1391(e) did not apply to former officials, the court canvassed the legislative history of § 1391(e), and then stated:

> The actions complained of by the plaintiff clearly were committed "under color of legal authority". To assert that because the defendants are no longer in government service the plaintiff may not utilize section 1391(e)—a section clearly intended to permit such actions—would as plaintiff contends, defeat the purposes of the statute. If the defendants desire to invoke official immunity, they may do so directly. *Lowenstein* v. *Rooney, supra,* at 962.

This Court is persuaded that the holding of *Lowenstein* more fully conforms to the policies behind the adoption of

19. In *Wu* v. *Keeney,* 384 F.Supp. 1161 (D.D.C. 1974), a damage action where jurisdiction was based on § 1391(e) was dismissed solely on this ground.

the broadened venue and service provisions of § 1391(e) than the holding in *Kipperman*.

First, the reasoning urged by defendants would permit an official to defeat an action against him for illegal acts accomplished under color of legal authority merely by resigning his position. *See Lowenstein* v. *Rooney, supra,* at 961.[20] And such reasoning creates its own difficulties with regard to officials who, while still in government service, have changed jobs.

Second, it seems clear that Congress intended by § 1391 (e) to facilitate private suits for redress of governmental action. Yet defendants' construction would require plaintiffs seeking relief to maintain multiple lawsuits in widely scattered jurisdictions, each involving the same facts and issues. That result seems at odds with the Congressional intent in enacting Section 1391(e), "a plaintiff's provision", *Powelton Civil Home Owners Ass'n.* v. *Dept. of Housing and Urban Dev., supra* at 833.

The final reason advanced by defendants against reading § 1391(e) as applying to former officials is that it would unduly burden government service. As the *Kipperman* court observed:

> The construction urged by plaintiff would potentially subject a retired government official to suit in any federal court in the country . . . The Court finds it inconceivable that Congress would so substantially broaden the venue provision applicable to every individual once employed by the federal government without comment. *Kipperman* v. *McCone, supra,* at 877.

However, since it is undisputed that Congress subjected *present* government officials to suit in any federal court

20. Plaintiff points out that defendant Cotter resigned the same month this lawsuit was filed.

under § 1391(e), it is necessary to determine exactly how much of an added burden the construction proferred by plaintiffs would place on retired officials. The Court must ascertain the Congressional intention in § 1391(e). If the plaintiff's construction would entail a significant added burden on government service, that would be persuasive reason to conclude that Congress would not have taken such a step without comment.[21]

The Court has examined defendants' arguments and fails to perceive any significant burden of federal service *added* by construing § 1391(e) to apply to former officials. Certainly personal liability itself is not such an added burden, since government service is already burdened with personal liability beyond the reach of official immunity. *See, e. g., Halperin* v. *Kissinger,* 424 F.Supp. 838 (D.D.C.1976). Neither Congress nor the courts have found that subjecting government officials to such liability impedes the proper functioning of the government. To the extent that such liability deters wrongful acts, that of course is its purpose. Nor does the Court believe that able men and women would be deterred from entering federal service if their liability were not terminated by their withdrawal from the government. Few men or women know how long they will be in government service when they enter: the interest in cutting off liability is served by statutes of limitations, which fairly mitigate such burdens as exist for all officials, in or out of government.

Nor does the Court find significant added burdens on federal service in defending such lawsuits. As plaintiff

21. For example. Defendant Bundy contends that construing § 1391(e) to include former government officials would "be patently unfair and would impose an impossible burden on government service". Bundy Memorandum at 10. He argues that plaintiff's construction would deter able men from entering federal service. Id. at 13.

points out, the principal burden of defending any lawsuit is the expense of counsel. But it seems to be undisputed that it is the policy of the Justice Department to defend lawsuits against present and former officials by citizens claiming redress for actions accomplished under color of legal authority. The record here shows that the Justice Department has retained private counsel to represent each of the defendants.[22] Indeed, this palpable manifestation of the continuing relationship between the government and its former officials strengthens plaintiffs' argument, and demonstrates the continuing responsibility which the United States bears for acts committed under color of law by persons formerly in the service of government. As for other burdens of defending the lawsuit, apart from counsel and ultimate liability, it is clear that these are insignificant. By far the greatest portion of effort required in defending this lawsuit will not require defendants to travel or undertake other actions interfering with their ongoing activities.

Since the Court cannot find significant burdens placed on former employees in defending lawsuits such as these under government expense, other than those burdens which employees of the government are all aware they face (i.e., liability for wrongful acts accomplished by misuse of official power), it agrees with the *Lowenstein* court that the proper construction of § 1391(e) renders it applicable to present and former officials alike.

22. A press release issued by the Department of Justice on December 12, 1975, and attached to plaintiff's Memorandum in Opposition to Defendants' Motions to Dismiss the Complaint, states:

> The Department . . . usually would represent all the present and former employees for actions they took while federal officials.

Since the Department has been conducting a criminal investigation of the mail-opening program, representation of these defendants would have created a conflict of interest, and the government decided instead to retain private counsel for each of the defendants here.

Venue under Section 1391(e)

[9] The arguments defendants make concerning § 1391 (e)'s inapplicability to damage actions against former officials apply to venue as well as to personal jurisdiction. Since the Court holds that § 1391(e) authorizes the exercise of personal jurisdiction in light of the allegations in the complaint, it necessarily holds that § 1391(e) supplies venue as well.[23]

Specificity of Allegations

[10] Various defendants contend that the complaint fails to allege specific facts connecting them with Rhode Island. The case they rely on, *Socialist Workers' Party* v. *Attorney General of the United States*, 375 F.Supp. 318 (S.D.N.Y. 1974) holds that New York's long-arm statute requires a plaintiff suing an out-of-state defendant under a conspiracy theory to allege "definite evidentiary facts" connecting the defendant to transactions occurring in New York to subject him to New York jurisdiction. *Id.* at 322.

Since the Court holds that Rhode Island's long-arm statute provides no limitation on the court's exercise of jurisdiction over defendants sued pursuant to § 1391(e), the *Socialist Workers* case is inapposite. Plaintiffs have pleaded the only forum-related activity which they must plead to establish personal jurisdiction: activity within the forum, i. e., the United States.

To the extent that defendants contend that the complaint fails properly to allege sufficiently specific facts regarding

23. Plaintiffs have also sought to ground jurisdiction on Rhode Island's long-arm statute, Section 9-5-33, Rhode Island General Laws (1956), basing venue on 28 U.S.C. § 1391(b). However, since the Court has found jurisdiction and venue for all plaintiffs under 28 U.S.C. § 1391(e), and since Rhode Island's long-arm statute could ground jurisdiction at most for plaintiff Driver, the Court does not reach these issues.

acts of defendants which have harmed plaintiffs, a different question is presented.[24] The Court has already indicated its intention to entertain motions under Rule 12(b)(6) at a later date.

Motion to Dismiss of Defendant Kelley

[11] Plaintiffs seek injunction "enjoining the defendants from engaging in the activities declared to be illegal and unconstitutional" against Defendant Clarence Kelley, the Director of the Federal Bureau of Investigation, and

> A mandatory injunction or writ of mandamus ordering the defendants to produce before this Court for destruction, all files, reports, records, photographs, data computer tapes and cards, and all other materials derived from defendants' illegal and unconstitutional activities relating to plaintiffs and all other persons similarly situated. (Prayer for Relief C. 2nd Amended Complaint)

Defendant moves to dismiss on grounds of mootness, claiming that the challenged operation was terminated in 1973. They rely on an affidavit of Vernon A. Walters and on the Report to the President by the Commission on CIA Activities Within the United States (hereinafter "the Rockefeller Report").

It is clear that the plaintiffs' claim for mandatory injunctive relief, at least, is very much alive, and that Defendant Kelley is the only defendant against whom such

24. The court in *Kipperman* v. *McCone*, 422 F.Supp. 860 (N.D.Cal.1976) seems to have considered the Rockefeller Report as a source of "definite evidentiary fact" for the purpose of ruling on preliminary jurisdictional motions. This court does not decide now whether or not it may consider the Rockefeller Report of the Select Committee in ruling on whether or not plaintiffs have sufficiently stated a claim against particular defendants in order to survive a Rule 12(b)(6) motion to dismiss.

relief could be awarded. They contend that copies of their first-class mail, opened by defendants, remain in FBI files. If true, that would amount to a continuing, real and substantial controversy with Defendant Kelley. The action is therefore not moot. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937). *See also DeFunis* v. *Odegaard*, 416 U.S. 312, 318, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). The motion to dismiss of Defendant Kelley is denied.[25]

Interlocutory Appeal

[12] Finally, it seems apparent that the Court's resolution of the difficult jurisdictional questions before it involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. As the opinion demonstrates, various federal courts have come out on different sides of nearly every issue regarding the reach of § 1391(e) faced by this Court. Furthermore, if the Court's resolution of these questions is mistaken, in all likelihood this action would be terminated in this Court. The Court therefore makes the certification required by 28 U.S.C. § 1292(b) as to the denial of the motions to dismiss of all the defendants except for Clarence Kelley and the United States.

25. Plaintiff also claims that injunctive relief might well be appropriate even if the mail opening program has ended. While injunctive relief is normally predicated only on a threat of imminent irreparable harm, it has been held that in extraordinary cases egregious past harm, as to which the danger of repetition has not been removed, and which continues to have serious repercussions in the community, warrants the grant of injunctive relief. *Lankford* v. *Gelsten*, 364 F.2d 197, 204 (4th Cir. 1966). *See also Rizzo* v. *Goode*, 423 U.S. 362, 373 n. 8, 96 S.Ct. 598, 46 L.Ed2d 561 (1976). Since the Court finds the case not moot as to Defendant Kelley on other grounds, it need not consider whether the very serious acts complained of here meet the *Lankford* test.

Class Action

[13] Plaintiffs, who seek declaratory and injunctive relief and money damages, move the Court to certify a class composed of

> [A]ll United States citizens and residents whose first-class letters, written and sent by or to them, either from within or destined for the United States, were unlawfully opened, read and photographed by employees of the Central Intelligence Agency, acting in concert with employees of the United States Post Office Department, the United States Postal Service, the Federal Bureau of Investigation, the Department of Justice, and other government agencies resulting in the unlawful collection, maintenance and dissemination of files relating to them.

Defendants oppose class certification on a variety of grounds. At the threshold, they object to the conclusory terms in which the class is defined—those whose mail has been "unlawfully" opened, read, and photographed. In view of the fact that the same representation can be achieved by a class composed of "those whose mail has been opened, read, and photographed in connection with the East Coast Mail Intercept Program", the Court sustains defendants' objection; plaintiffs are directed to modify the definition of the proposed class accordingly.

[14] In addition to problems raised by defendants, the Court has its own liminal problems with the class as currently defined. It became clear at the hearing held on this matter that beneath the surface of the broad class that plaintiffs seek to represent there exist two well-defined subclasses. On the one hand, there are those persons whose mail was, according to the Rockefeller Report, opened, photographed or otherwise tampered with on a purely random

basis. This sub-class apparently numbers in the tens of thousands. *See* Rockefeller Report 105. On the other hand, there is a smaller group, consisting of different individuals over the years, but averaging about three hundred persons at any one time, *see* Rockefeller Report 105. This sub-class is composed of persons on the so-called "watch-list", individuals of particular interest to one or more of the nation's intelligence bodies whose mail was the object of special scrutiny. See id. at 105, 111. The two groups are in markedly different positions. By definition, the watch-list sub-class had its mail surveilled for some reason, although what the reason was in each case remains to be seen. The random sub-class, on the other had, had its mail inspected for reasons of pure chance. Whether the different positions of the two groups will have any legal significance, the Court cannot now say. It is clear, however, that there are significant practical differences between the two groups, in terms of litigating this case. For example, defendants have already indicated that they believe that they had probable cause to inspect the mail of the persons on the watch-list. Proving this claim could involve extensive discovery by defendants, involving depositions from each watch-listed class member. It could also involve the presentation of an individual defense against each such person. By contrast, the "probable cause" defense would obviously be unavailable with respect to persons whose mail was randomly opened. In view of these differences between the two groups, the Court deems it appropriate that the class be divided into two sub-classes, composed of the random group and the watch-list group respectively.[26] *See* Fed.R.Civ.P.

26. Because the decision to create sub classes is made on the Court's own motion and only after the hearing on class determination, the Court has not been informed whether named plaintiffs fall into the random sub-class, the watch-list sub-class or both. This information

23(c)(4)(B); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 184-85, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Douglas J., dissenting in part). Rule 23(c)(4) requires the Court, once such a division has been made, to construe and apply the remaining provisions of Rule 23 accordingly. It is to that task that the Court now turns.

A. *The Requirements of Rule 23(a)*

Rule 23(a) provides:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[15] As to the random sub-class, the Court has no difficulty in finding that the requirements of Rule 23(a) are satisfied. The class of persons whose mail was randomly opened numbers in the tens of thousands, *see* Rockefeller Report 105. The claims of plaintiffs (that their mail was randomly opened in violation of the fourth amendment) as well as the defense (that the mail intercept program was undertaken reasonably and in good faith) are typical class wide. The mail intercept program, as a whole, raises common questions of fourth amendment law that do not vary

should be furnished to the Court without delay, by stipulation or otherwise. It will be necessary that at least one plaintiff be a member of each sub-class before an order of certification can issue. *See Sosna* v. *Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

perceptibly according to which random class member raises these questions. Further, there is no doubt that plaintiffs' attorneys from the American Civil Liberties Union are amply qualified to carry this action forward as a class action, thus assuring "adequacy of representation" in one sense of that term, *see Cullen* v. *United States*, 372 F.Supp., 441, 447-48 (N.D.Ill.1974).

[16] However, "adequacy of representation" also means that "the interests of the representative party must coincide with those of the class", *Mersay* v. *First Republic Corp.*, 43 F.R.D. 465, 469 (S.D.N.Y.1968). It has been suggested by one of the defendants that this requirement is not met in the present case because some persons whose mail was monitored might regard the East Coast Mail Intercept Project as entirely reasonable and in the national interest. This assertion, if true, is irrelevant to the question of whether this action may be maintained as a class action. *See Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968). If the relief sought in this case would adversely affect tangible interests of some proposed class members it might be argued that plaintiffs were not adequate representatives of the class. *See, e. g., Dierks* v. *Thompson*, 414 F.2d 453, 456 (1st Cir. 1969); *Burns* v. *United States Postal Service*, 380 F. Supp. 623, 629 (S.D. N.Y.1974). However, such an argument cannot be based on mere speculation as to what some class members might regard as sound national policy, and the Court finds that plaintiffs provide the adequacy of representation for the interest of the proposed sub-class that is required by Rule 23(a).

[17] The issues posed by the question whether the watch-list sub-class meets the requirements of Rule 23(a) are somewhat different. There is no problem as to numeros-

ity. Although the total number of persons on the list over a twenty-year period has not been ascertained, the average number of persons on the list at any given time was about 300, *see* Rockefeller Report 106, a number in itself sufficient to render joinder impracticable. *Cf. Cullen* v. *United States,* 372 F.Supp. 441, 447 (joinder of 325 persons clearly impracticable). As to adequacy of representation, the Court's earlier remarks *a propos* the random sub-class apply to the watch-list sub-class with equal vigor, and the Court finds adequacy of representation as to that group.

The more difficult question is whether any of the named plaintiffs present claims that are typical of the class and raise issues involving common questions of law or fact. Basically, defendants contend that the legality of the surveillance of watch-listed persons depends on the particular facts of each case, as those facts shed light on the reasonableness of each intercept. Such individualized determinations, defendants argue, are the very antithesis of the typicality and common questions required by Rule 23(a). This argument does not really address plaintiffs' theory of the case.

In plaintiffs' view, a warrantless surveillance of *any* first-class mail for intelligence purposes is presumptively illegal under *any* circumstances. If this view is correct—and now is not the time to make a judgment on that point, *see Yaffe* v. *Powers,* 454 F.2nd 1362, 1366 and n. 2 (1st Cir. 1972); *Fogel v. Wolfgang,* 47 F.R.D. 213, 215 n. 4 (S.D.N.Y. 1969)—than plaintiffs are also correct in asserting that the myriad targets of the intercept program have a unitary claim whose validity is dependent upon a single question of law. Should it become clear that plaintiffs' view of the law will not prevail the sub-class can be modified or dismissed. *See Yaffe* v. *Powers,* 454 F.2d at 1367. For the present, the Court finds that the requirements of typicality and commonality, as well as numerosity and adequacy of representation are present with respect to the watch-list sub-class.

B. *The requirements of Rule 23(b)*

[18] In addition to the requirements of Rule 23(a), plaintiffs must satisfy one or more of the requirements of Rule 23(b) in order to obtain class certification. It is plaintiffs' position that the instant action may be maintained under any of the following provisions of Rule 23(b):

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or . . .
>
> . . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

While disputing generally that the requirements of any portion of Rule 23(b) have been met, defendants urge in particular that plaintiffs cannot properly bring this action under Rule 23(b)(2) since, in addition to injunctive relief, plaintiffs seek money damages in excess of $1 billion and Rule 23(b)(2), by its terms is applicable only to claims for "final injunctive or corresponding declaratory relief." Without disputing plaintiffs' contention that "incidental" monetary relief can be given in conjunction with injunctive or declaratory relief under Rule 23(b)(2), it seems to the Court beyond dispute that plaintiffs' attempts to impose substantial financial liability on defendants cannot fairly be characterized as "incidental." *See, e. g. Robertson* v. *National Basketball Association,* 389 F.Supp. 867, 900 (S.D. N.Y.1975); Advisory Committee's Notes to Rule 23, 39 F.R.D. 98, 102 (1966).

[19] However, this is not to say that a claim for class-wide injunctive relief should be denied merely because it is coupled with a claim for a money judgment, however substantial. In order to preserve injunctive relief, the better course, in this Court's view, is to certify the declaratory and injunctive claims for class-wide relief under Rule 23(b)(2) if the requirements of that rule and of Rule 23(a) are met and then consider as a separate matter whether the claims for money damages can be maintained under Rule 23(b)(1) or Rule 23(b)(3). See 3B Moore's Federal Practice ¶ 23.45 [1] at 708-09.

In the present case, it is clear that if plaintiffs prevail on the merits and satisfy the other requirements for declaratory and injunctive relief, such relief can be appropriately granted on a class-wide basis, both with respect to the watch-list sub-class and the random sub-class. As to the random sub-class, such relief, if it is to be granted to any member of the group, should be granted to all, since the very definition of the sub-class belies any individual differences among its members and defendants' decision to institute random mail surveillance was based on the common factor of the destination of the mail surveilled rather than upon any particularizing characteristics of individual addresses.

As to the watch-list sub-class, defendants claim to have acted on the basis that surveillance of persons in that group was reasonably justified. Should that assumption prove erroneous *in toto,* class-wide relief will be appropriate. Should the assumption be upheld in its entirety, defendants will be entitled to a judgment in their favor running against the sub-class as a whole. If the validity of defendants' "reasonableness" standard must be tested on a case-by-case basis, the sub-class can be dismissed as improvidently certified. *See, e. g. City of Philadelphia* v. *Emhart Corp.,* 50 F.R.D. 232, 235 (E.D.Pa.1970). At this juncture, the common thread of "reasonableness," generally applicable to the entire sub-class, is sufficient to permit certification of the watch-list sub-class under Rule 23(b)(2) for purposes of seeking declaratory and injunctive relief.[27]

[20] It remains to be determined whether plaintiffs' claims for money damages are amenable to class treatment.

27. Defendants have argued that appropriate injunctive relief may be framed in this case without certifying a class. *See e. g., District of Columbia Podiatry Society* v. *District of Columbia,* 65 F.R.D. 113 (D.D.C.1974). This Court, however, will follow what it regards as the better rule, that, at least in civil rights cases, certification for purposes of injunctive relief is appropriate wherever the requirements of Rule 23 have been met. *See, e. g., Fujishima* v. *Board of Education,* 460 F.2d 1355, 1360 (7th Cir. 1972).

More precisely, the Court must consider whether plaintiffs can maintain a class action on the issue of liability for money damages, for the Court rejects at the outset plaintiffs' contention that the actual assessment of damages to individual class members can be tried on a class-wide basis. As defendants accurately point out, the gravamen of plaintiffs' damages claim is that the privacy of persons whose mail was monitored has been violated. How much compensation, if any, such persons are entitled to is necessarily a matter that the jury must assess on a case by case basis, assessing the harm done in each case. Plaintiffs' suggestion that a dollar amount can be arbitrarily assigned as compensation for each letter opened or photographed cannot be accepted. *Dellums* v. *Powell,* No. 1022-71 (D.D.C.), *appeal pending,* a case cited by plantiffs in which classwide damages for constitutional violations were awarded, did not involve the uniquely subjective claims of privacy that are implicated when, as here, a fourth amendment violation is claimed.

In deciding the question of whether a class action on the issue of liability can be maintained by either of the subclasses, a threshold problem arises that is not present if the claims for relief were limited to declaratory and injunctive relief.

The problem, although identified by defendants as related to the question of whether plaintiffs' claims are typical of those of the class sought to be represented, might also be described as one of standing. To the extent that plaintiffs seek class-wide declaratory and injunctive relief, there can be little doubt as to their standing. Plaintiffs allege that they and all other class members have been the victims of a government program that has violated their constitutional and statutory rights and seek a declaration that the program was illegal, an injunction against its continuance, and

a mandatory order that the files kept as a result of the program be destroyed. Insofar as this relief can be obtained from the present governmental officials who are parties to this suit, it is clear that plaintiffs have standing to seek this relief on behalf of the class. The harm that the named plaintiffs allege is the same as that of the two subclasses generally: it is the threatened continuation of the program and the continued existence in government files of the information gleaned by the program.

The claims on liability for money damages stand on a somewhat different footing.[28] Plaintiffs seek money damages on behalf of the class from each of the officials responsible for the mail intercept program throughout the twenty year period of its existence even though their own individual mail was only allegedly tampered with during a part of that period. The question is thus raised as to how plaintiff Driver, for example, whose mail was allegedly opened in 1965 and 1969, can have standing to seek damages from defendant Schlesinger, for example, whose involvement in the intercept program, by plaintiffs' own allegations, did not begin until after 1970; or against defendant Bissell, whose tenure with the CIA extended from 1959 only until 1962. Courts have resolved this question in various ways, some holding that class representation is not possible under such circumstances, *see, e.g., Weiner* v. *Bank of King of Prussia,* 358 F.Supp. 684 (E.D.Pa.1973); *see also La Mar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973) (lack of typicality). On the other hand, at least one court

28. It is not clear from plaintiffs' complaint whether they seek an injunction against former CIA, FBI, and post office personnel or a declaration that these former officials' conduct was illegal. If such relief is indeed sought, it raises the same standing problems as does the claim for monetary relief and the Court's discussion of that point applies equally to claims for declaratory and injunctive relief against former officials.

has held that a class action is maintainable even where plaintiffs would be unable in their own right to bring an action against all of the defendants. *Haas* v. *Pittsburgh National Bank*, 60 F.R.D. 604, 611-614 (W.D.Pa. 1973).

This Court need not attempt to resolve these conflicting positions, since it appears that the rule that one or more of the named plaintiffs must individually have a cause of action against each named defendant in order for a class action to be maintained does not apply to "situations in which all injuries are the result of a conspiracy" or to "instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *La Mar*, 489 F.2d at 466.

[21] In the Court's opinion, plaintiffs' complaint fits both branches of the *La Mar* exception. Plaintiffs' complaint alleges a massive and concerted program of covert mail intercepts over a twenty-year period, the maintenance of on-going files based on information gleaned from the intercepts, and a conspiracy to conceal the existence of the entire operation. The officials and former officials named are, moreover, juridically related in that they are all past and present federal officials whose duties included oversight either of foreign or domestic intelligence gathering or the proper delivery of the U. S. Mail. These considerations fit the present complaint easily within the *La Mar* exception. *See also Washington* v. *Lee*, 263 F.Supp. 327, 330-31 (M.D. Ala.1966) (plaintiffs segregated by race in one county jail can represent class of similarly situated persons in all county jails throughout state). Accordingly, the Court holds that named plaintiffs who are members of the two sub-classes have standing to raise the claims of the members of their respective sub-class against former officials whose tenure does not correspond to the dates of the individual mail openings alleged by any of the named plaintiffs.

The Court now turns to the question of whether a class-wide claim that defendants' conduct has rendered them liable in damages fits either of the two remaining sections of Rule 23(b) suggested by plaintiffs.

It seems clear that Rule 23(b)(1)(A) cannot apply to the liability claim. Assuming that Rule 23(b)(1)(A) is applicable to claims for damages, a question not free from doubt, *see, e.g., Kristiansen* v. *John Mullens & Sons, Inc.*, 59 F.R.D. 99, 105 and n. 6 (E.D.N.Y. 1973); *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 415 and n. 5 (S.D.N.Y. 1972); *but see Berman* v. *Narragansett Racing Association*, 48 F.R.D. 333, 337 (D.R.I.1969) (by implication) the rule is inapposite to the present facts. The plaintiffs argue that Rule 23(b)(1)(A) certification is necessary to establish compatible "standards of conduct for the party opposing the class." However, the Court's decision to certify the sub-classes under Rule 23(b)(2) for class-wide injunctive relief has accomplished this for it will necessarily mean that a class-wide adjudication will be forthcoming (unless the class is de-certified) that will establish a standard of conduct to be observed by defendants in the future and will preclude any need for the establishment of such a standard by means of a damages action under Rule 23(b)(1)(A).

There remains Rule 23(b)(3). In order for plaintiffs to maintain a class action on the issue of liability on behalf of either sub-class, the Court must find that common questions of law and fact predominate over individual questions and that "a class action is superior to other available methods for the fair adjudication of the controversy." Rule 23(b)(3).

[22] Insofar as plaintiffs seek a class-wide adjudication of defendants' liability on behalf of the random sub-class, there is little doubt that such treatment is warranted. The Court has already determined to make a class-wide adjudi-

cation of the legality of the intercept program under Rule 23(b)(2). Adjudication of the issue of liability will add only the element of any good faith or other defense that defendants choose to raise. Since the random sub-class members are completely fungible, having been selected by chance and the accident that they all corresponded with persons in the Soviet Union, it cannot be said that the validity of any defenses raised will vary from individual to individual, or that any individual class member will have any special interest in controlling his or her individual litigation. Judicial economy, the prevention of multiple lawsuits, the absence of any substantial difficulty in concentrating this litigation in this forum—all of these factors lend additional support to the Court's conclusion that defendants' liability to the random sub-class should be adjudicated as a class action.

[23] Application of the Rule 23(b)(3) criteria to the watch-list sub-class leads to a quite different conclusion. Defendants have made it clear that they plan to defend against liability for the mail surveillance of watch-listed persons on the grounds that they reasonably believed that each such surveillance was proper. When the Court considers the extensive pre-trial discovery and trial testimony that such a defense will entail, it must conclude that the question of the manageability of such a class action raised by defendants is no mere spectre, and poses serious problems that render class action certification of the watch-list sub-class on the question of defendants' liability inappropriate at this time.[29]

29. Two reasons dictate a different result concerning certification under Rule 23(b)(3) of a class action an behalf of the watch-list subclass with respect to the issue of liability than was reached with respect to certification under Rule 23(b)(2) for the claims for declaratory and injunctive relief. First, the "good-faith" defense, with its concomitant problems is obviously not available insofar as the relief sought is declaratory and injunctive. Second, and controlling, "the existence of 'predominating' questions and the availability of other methods of resolution which might be superior to a class action are not criteria of a subdivision (b)(2) class, but . . . of a (b)(3) class . . . ." *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

C. *Notice*

[24] Because the liability issue in this case will proceed as a Rule 23(b)(3) class action on behalf of the sub-class of persons whose mail was randomly photographed, opened, or inspected in connection with the East Coast Mail Intercept Program, notice to members of the sub-class is required by Rule 23(c)(2). This notice must include individual notice to sub-class members if the addresses of the individuals are available through reasonable effort. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Whether the addresses are available in the present case can only be determined after discovery proceedings, and the Court will enter an appropriate order regarding notice at that time. It should be noted that whatever notice is ordered must be at plaintiffs' expense. *Id.* at 178-179, 94 S.Ct. 2140. Plaintiffs' contention that the government should bear the cost of notice in this case cannot be sustained under *Eisen*. While the *Eisen* Court left open the possibility that defendants may be made to bear the cost of notice where there exists a fiduciary relationship between plaintiff and defendants, plaintiffs have not established that such a relationship exists between plaintiffs and defendants in the present case.

[25] One final comment is in order. Defendants, citing *Berlin Democratic Club* v. *Rumsfeld*, 410 F Supp. 144 (D.D.C.1976), argue that maintenance of a class action in this case will lead to endless procedural battles over dis-

covery and impermissible inquiries into the nature and scope of intelligence activity. The latter objection, whatever its validity in other cases, is inapplicable to the present case, where the East Coast Mail Intercept Program is already a matter of detailed public knowledge due to the publication of the Rockefeller Report and the Report of the Select Committee. The existence of those reports should also preclude many objections to discovery that might otherwise be made. In any case, plaintiffs here have raised a class-wide claim for injunctive and declaratory relief that they seek to certify under Rule 23(b)(2) as well as claims for class-wide damages under Rule 23(b)(3). While considerations of undue publicity might conceivably have some bearing on the determination the Court must make under Rule 23(b)(3) as to whether a class action is superior to other modes of adjudication, no such determination is authorized under Rule 23(b)(2). Since the same information will undoubtedly be sought in discovery whether the relief sought is injunctive and declaratory only or is coupled with claims for money damages, defendants' objections on grounds of undue publicity must be rejected.

To summarize, the Court finds that plaintiffs' proposed class of all United States citizens whose mail was unlawfully opened, read, and photographed must be amended to avoid the conclusory term "unlawfully," that the class must be divided into sub-classes composed of those persons whose mail was opened, read, and photographed randomly and those persons whose mail was opened, read, and photographed based on their presence on the watch-list, that at least one named plaintiff must be a member of each sub-class, that a class action may be certified as to both sub-classes under Rule 23(b)(2) for purposes of adjudicating the claims for injunctive and declaratory relief, that a class

action on behalf of the random sub-class may be certified under Rule 23(b)(3) for purposes of adjudicating the claim that defendants are liable in damages to the members of that sub-class, that class certification of the liability claims of the watch-list sub-class is inappropriate at this time, and that individual notice of the class action on the issue of liability must be sent at plaintiffs' expense to all members of the random sub-class whose addresses are obtainable through reasonable effort.

Counsel will prepare an order in accordance with this opinion.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

RODNEY DRIVER, *et al.*
v.
RICHARD HELMS, *et al.*

Civil Action No. 75-224

ORDER

This matter having come before the Court (1) on the various motions of the defendants excepting Clarence M. Kelley and the United States to dismiss under Federal Rules of Civil Procedure 12(b)(2), 12(b)(3) and 12(b)(4); and (2) on the motion of defendant Clarence M. Kelley to dismiss under Federal Rules of Civil Procedure 12(b)(6) (on grounds of mootness); and pursuant to the Opinion of this Court dated April 1, 1977, in regard to these motions, it is hereby

ORDERED

(1) That the Motions of each and every Defendant, other than Clarence Kelley and the United States of America, to dismiss the Amended Complaint pursuant to Rules 12(b)(2), 12(b)(3), and 12(b)(4) of the Federal Rules of Civil Procedure for lack of jurisdiction over the person, improper venue and insufficiency of process be, and each of said Motions hereby is, denied.

(2) The Court being of the opinion that this Order, denying the Motions of all Defendants, other than Clarence Kelley and the United States of America, to dismiss the

Amended Complaint pursuant to Rules 12(b)(2), 12(b)(3), and 12(b)(4) of the Federal Rules of Civil Procedure, involves a controlling question of law concerning the interpretation and application of 28 U.S.C. § 1391(e) as to which there is substantial ground for differences of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation, it is hereby ordered, pursuant to 28 U.S.C. § 1292(b), that each Defendant, other than Clarence Kelley and the United States of America, be and hereby is granted the opportunity to apply to the United States Court of Appeals for the First Circuit within ten (10) days from the entry of this Order for permission to appeal to said Court from this Order.

(3) That the Motion of Defendant Clarence Kelley to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6), on the ground that, as to him, it is moot, be and hereby is denied.

By Order,

KATHLEEN M. POWERS
Deputy Clerk

Enter:

RAYMOND PETTINE
Chief Judge
October 4, 1977

APPENDIX C

No. 77-1482

RODNEY D. DRIVER, *et al.*
Plaintiffs, Appellees,

v.

RICHARD HELMS, *et al.*,
Defendants, Appellants.

JUDGMENT

Entered: May 25, 1978

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

> The order of the District Court is affirmed in part and reversed in part and the case is remanded to the District Court for further proceedings consistent with the opinion filed this day. The "former officials" are awarded costs from the plaintiffs, appellees. The plaintiffs, appellees are awarded 80% of their costs from the remaining appellants.

By the Court:

DANA H. GALLUP
Clerk

By: /s/ FRANCIS F. SAIGLIANO
Chief Deputy Clerk

APPENDIX D

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C. A. No.: 75-0224

RODNEY DRIVER, *et al.*
RICHARD HELMS, *et al.*

OPINION

In *Driver* v. *Helms,* 74 F.R.D. 382 (D.R.I. 1977), this Court concluded that this suit should proceed as a class action consisting of those persons whose first class mail (written and sent by or to them, either from within or destined for the United States) was opened, read and photographed in connection with the East Coast Mail Intercept Program of the Central Intelligence Agency, which opening resulted in the collection, maintenance and dissemination of files relating to members of the class.

That opinion divided this group into two sub-groups and determined that each of them was to be certified as a sub-class. The Court did so because it became clear that beneath the surface of the broad class that plaintiffs seek to represent there exist two well-defined sub-classes.

> On the one hand, there are those persons whose mail was, according to the Rockefeller Report, opened, photographed or otherwise tampered with on a purely random basis. This sub-class apparently numbers in the tens of thousands. *See* Rockefeller Report 105. On the other hand, there is a smaller

group, consisting of different individuals over the years, but averaging about three hundred persons at any one time, *see* Rockefeller Report 105. This sub-class is composed of persons on the so-called "watch-list", individuals of particular interest to one or more of the nation's intelligence bodies whose mail was the object of special scrutiny. *See* id. at 105, 111. The two groups are in markedly different positions. By definition, the "watch-list" sub-class had its mail surveilled for some reason, although what the reason was in each case remains to be seen. The random sub-class, on the other hand, had its mail inspected for reasons of pure chance. Whether the different positions of the two groups will have any legal significance, the Court cannot now say. It is clear, however, that there are significant practical differences between the two groups, in terms of litigating this case. For example, defendants have already indicated that they believe that they had probable cause to inspect the mail of the persons on the watch-list. Proving this claim could involve extensive discovery by defendants, involving depositions from each watch-listed class member. It could also involve the presentation of an individual defense against each such person. By contrast, the "probable cause" defense would obviously be unavailable with respect to persons whose mail was randomly opened. In view of these differences between the two groups, the Court deems it appropriate that the class be divided into two sub-classes, composed of the random group and the watch-list group respectively.
Id. at 402 (footnote omitted)

Counsel were directed to prepare an order accordingly. However, a conflict has developed between plaintiffs and defendants as to the meaning of the two sub-classes, a conflict which must now be resolved.

The plaintiffs assert that the Court intends the watch-list sub-class to include only a few named persons who were listed because the CIA had particular interest in them as individuals. The other sub-group was to contain all others, primarily those whose letters were opened on a completely random basis.[1]

The defendants assert that the watch-list is a much broader sub-class and includes all those persons whose letters were chosen on some basis other than a random one. It would thus include named persons, persons whose letters were sent to or from a particular address or region and persons whose letters bore the name of a particular organization. The defendants base this interpretation on the meaning which the CIA evidently attached to the term "watch-list".

It is clear that in fact watch-lists specified for interception not only letters to and from named persons but also letters with certain identifying characteristics such as organizational names and certain addresses. For example, according to the Church Committee Report,[2] watch-lists in

1. By "random", the Court did not mean only strict mathematical randomness in the selection of letters for scrutiny. Random here means selection without any particular purpose or reason. One CIA agent has described his approach to the random selection of letters.

> . . . "I personally used to like to do Central and South America items [that were missent by the Post Office]. . . . [Y]ou never knew what you would hit." He added: "We would try to get a smattering of everything, maybe the academic field or travel agencies or something. . . . I don't recall a specific instruction. I kind of place that under our individual tastes." Church Report at 575.

2. The full title of the relevant Church Report is
The Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the Select Committee To Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate 94th Cong. 2nd Ed. Report No. 94-755.

the year 1957 included named individuals who comprised the following categories:

> (1) former agents or covert contract personnel who originally came from "the Denied Area" in Europe, were utilized by the Agency, and have now been resettled in the United States or Canada;
>
> (2) defectors from "the Denied Area" in Europe who were under the control or auspices of the Agency and who have now been resettled in the United States or Canada;
>
> (3) repatriates from the United States or Canada who were originally brought to the United States or Canada under the auspices of the Agency and who have now returned or will return to the USSR;
>
> (4) suspected Soviet agents or other individuals either temporarily or permanently residing in the United States, who are known or suspected of being engaged in counterespionage or counterintelligence activities on behalf of the USSR; and
>
> (5) foreign nationals, originally from the USSR and satellite countries, now residing in the United States and presently being utilized by the Agency in any capacity.[3]

But we also know from the Rockefeller Report[4] that "organizations of particular intelligence interest were specified in watch-lists".[5] The Church Committee Report names some of these organizations:

> Among the individuals and organizations who came to be placed on the Watch List by the CIA were numerous domestic peace organizations, such as the

3. Church Committee Report at 573.

4. The full title of the Rockefeller Report is Report to the President by the Commission on CIA Activities Within the United States, June 1975.

5. Rockefeller Report at 105.

> American Friends Service Committee; political activists; scientists and scientific organizations, such as the Federation of American Scientists; academics with a special interest in the Soviet Union; authors, such as Edward Albee and John Steinbeck; businesses, such as Fred A. Praeger Publishers; and Americans who frequently travelled to or corresponded with the Soviet Union, including one member of the Rockefeller family.[6]

According to the plaintiffs', one watch-list included all letters addressed to or from Moscow State University[7] and another included all letters sent from the Republic of Georgia in the U.S.S.R. after Kruschev's denunciation of Stalin.[8]

It appears that watch-lists consisted, then, of two analytically distinct groups. One group was comprised of those named persons as to whom the CIA had specific reasons, uniquely related to the named and known individuals, to believe that cause existed for their surveillance. The other group consisted of persons sending or receiving letters, on the envelopes of which appeared some sign—address, regional area, organizational name—in which the CIA had an interest; but such sign did not give reasons, uniquely related to the individual letter sender or receiver, sufficient to convince the CIA that cause existed for surveillance of that person in order to ascertain particular facts. It is this latter set of persons, this middle group between random and named persons, who are the subject of dispute.

6. Church Report at 574 (footnote omitted).

7. Plaintiff's Memorandum citing the testimony of CIA Agent Robert S. Young, Tr. 105, in *Avery* v. *U.S.* and *MacMillan* v. *U.S.*, E.D. N.Y., 77C234 and 77C597.

8. Plaintiff's Memorandum, App. A, citing Memorandum for Chief of Operations, DDP, Subject HTLINGUAL Operation ¶ ¶ 7, 10.

The Court has three options. These persons may be included in the random class, the watch-list class or a new sub-class may be created of those persons whose envelopes were of interest to the CIA because of some general characteristic.

The plaintiffs argue that this middle sub-group belongs to the random class. They ask the Court to anticipate its eventual ruling on the fourth amendment claims[9] and to find that a warrant is required to search mail and that a search and seizure on the basis of some generalized identifying characteristic on the envelope, not uniquely related to the writer or recipient, is per se unreasonable and insufficient to constitute probable cause. *See Ex Parte Jackson,* 96 U.S. 727 (1878); *U.S.* v. *Van Leeuwen,* 397 U.S. 249 (1970) (border search).

The plaintiffs vigorously assert that the constitutional standard for seizures requires "reasonableness" as to individual persons and not as to envelopes. For a search of envelopes is like a search pursuant to a general writ, the

9. In deciding the class issue, the Court must undertake a preliminary consideration of the fourth amendment claims which will be advanced, solely for the purpose of anticipating the eventual structure of this suit. The Court is mindful that the Supreme Court has asserted that a class may not be certified on the basis of a ruling on the merits. *Eisen* v. *Carlisle and Jacquelin,* 417 U.S. 156, 177-78 (1974).

In *Eisen,* the district court had held a preliminary hearing on the merits to determine whether to certify a class. The Supreme Court found such a determination to be contrary to the requirements of Rule 23 and to lead to the possibility of substantial prejudice to the defendant in subsequent proceedings.

Contrary to the defendant's arguments, this holding does not apply to the instant context. This Court reviews the substantive claims in a preliminary way in order to anticipate the extent to which individualized hearings must be held on the defendant's defenses of reasonableness and good faith. The Court must consider this under the manageability and typicality requirements of Fed.R.Civ.P. 23(a). The defendants are hardly prejudiced by a determination which, contrary to the plaintiffs' position, essentially facilitates their making-out their defenses.

very thing which the fourth amendment forbids. Such searches, they argue, violate the requirement of particularity for they permit broad-ranging searches without a focus on a specific person and his particular effects.[10] The plaintiffs claim that it is only with regard to persons having a "significant connection with a foreign power" that any lesser standard of reasonableness might be applied, see *United States* v. *United States District Court,* 407 U.S. 297, 309 (1972); *Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir. 1975), *cert. denied* 96 St. Ct. 1685 (1976). It is sensible, the plaintiffs conclude, to constitute the watch-list class of only those named persons as to whom the Court would, under these standards, have to make an individualized determination of reasonableness and to place all others in a separate class.

The defendants claim to the contrary that individualized determinations of reasonableness and good faith will be required as to all persons whose letters were opened on the basis of any watch-list, *Bivens* v. *6 Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339 (2nd Cir. 1972). They argue that the national security interest vests broad authority to search letters, particularly at the border, so long as some reason exists no matter how general. The defendants appear to suggest, though not explicitly, that, when the government acts in the national

10. The First Circuit has recently emphasized the importance of the particularity requirement of the fourth amendment in *United States* v. *Klein,* Slip Op. (1st Cir. November 14, 1977). It reviewed "the constitutional propriety of generic descriptions", in search warrants, of items to be seized, *id.* at 11. The question of generic descriptions has usually been raised in cases implicating the first amendment. However, the First Circuit insists that in all cases, even those involving contraband, a generic description of goods to be seized, without a more particularized itemization, fails to provide any "before the fact guidance to the executing officers" with the result that "there exists a substantial and unjustifiable likelihood of a violation of personal rights." *id.* at 12.

security intrest at the borders of our country, the Constitution only forbids it from engaging in irrational, arbitrary or capricious behavior, if that. At trial, defendants will therefore seek to offer individualized reasons for all seizures except those made on a random basis.

They argue in addition that the law governing searches in the national security interest at the borders of this country has been so uncertain and the political climate so varied between 1953 and 1973 that good faith determinations will be difficult and must be made with sensitivity not only as to each defendant but with regard to each year of surveillance during the existence of the Intercept program.

A preliminary review of the defendants' arguments, but prior to full briefing on these matters, suggests certain misconceptions which lead them to argue in favor of the broadest expansion of the watch-list class. They cite the recent Supreme Court opinion, *United States* v. *Ramsey,* 97 Sup. Ct. 1072, 45 U.S.L.W. 4577 (1977), which adopted the majority rule of the circuits with regard to border searches for contraband by customs officials who act with the specific purpose of enforcing laws against the introduction of contraband into this country. The Court found that such searches constitute an exception to the warrant and probable cause requirements of the fourth amendment; the case may go so far as to stand for the proposition that such searches are *per se* reasonable. *Ramsey* dealt with the opening of a bulky letter pursuant to a statute which required "reasonable cause" to believe that a customs law was violated and a regulation which forbade the reading of any letter inside. A postal inspector opened one of eight similar envelopes from Thailand for the sole purpose of detecting a controlled substance, heroin after a tactile examination of the bulky and heavy envelope suggested

contents other than a letter. *Ramsey* is therefore inapplicable to the case at hand for first and fifth amendment rights are implicated here, not the rights of heroin smugglers who, not by address alone but also by the bulkiness of the envelope, gave notice to a mail official that he would find contraband, not words, inside.

The fourth amendment law which should have been argued to this Court is found in those cases which recognize the interaction of the first, fourth and fifth amendments, as they impose "substantive limits", *id.* at 4580, on the power to search and seize. For example, in *Standford* v. *Texas,* 379 U.S. 476 (1965), the Court unanimously noted. "The point is that it was not any contraband (weapons, narcotics or whiskey) of that kind was ordered seized, but literary material . . .", *id.* at 486. *See, United States* v. *United States District Court,* 407 U.S. 297, 313-14 (1972); *Lee Art Theatre* v. *Virginia,* 392 U.S. 636 (1968); *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964); *Marcus* v. *Search Warrant,* 367 U.S. 717 (1964); *Boyd* v. *United States,* 116 U.S. 616, 626-27 (1886); *Stanley* v. *Georgia,* 394 U.S. 557, 569 (1969) (Stewart, J. concurring); *Berger* v. *New York;* 388 U.S. 41, 89 (1967) (Harlan, J. dissenting); *Frank* v. *Maryland,* 359 U.S. 360, 376 (Douglas, J. dissenting); *cf. Entick* v. *Carrington,* 19 How.St.Tr. 1029 (1765); *Wilkes* v. *Wood,* 19 How.St.Tr. 1153 (1763). *But cf. Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *U.S.* v. *Twelve 200 Ft. Reels of Film,* 413 U.S. 123 (1972); *U.S. 37 Photographs,* 402 U.S. 363 (1971).

The defendants claim that, because they acted in the national security interest, they need proffer a lesser degree of probable cause and particularity to meet the constitutional standard of reasonableness: a suspicion that a letter would be of interest to the CIA, if based on some general reason such as address, would suffice under the Constitution. Defendants cite *Korematsu* v. *United States,* 323

U.S. 214 (1944), in support of the proposition that seizures may be made on the basis of some generalized group characteristic (in that case race, in this case geographical origin or destination of a letter) when the national defense is at stake. That case which involved the United States government in invidious discrimination will not be lightly cited to this Court. During the most perilous of times, during a war fought on two fronts, each endangering a coast of this country, emergency measures were undertaken unprecedented for the United States in this century. In response, the Supreme Court went so far as to uphold a regulation that persons of Japanese origin had to remove themselves from military areas on the west coast.[11] That decision provoked such doubts from Justice Jackson, in his dissent, that he counseled against judicial review of what he called an essentially unreviewable act of a military commander during war. Review he argued would needlessly and dangerously generalize a legal principle, well beyond the unique events which gave rise to the military's emergency action, *id.* at 246.

These fears were prescient. For now come the defendants' lawyers claiming an analogy between the direst of national emergencies and the period from 1953-73. Those times, while not within the mature memory of defendants' counsel are within the memory of this Court. The *Korematsu* case is not applicable. Congress had then declared war. It has never declared war since. The military acted pursuant to a publicly promulgated executive order and a Congressional criminal statute enforcing the order. This all took place in full view of the American public. The

11. In *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944), the Supreme Court interpreted an executive order in light of constitutional considerations to find that a person of Japanese origin who was concededly loyal could not be detained because of his race.

checks and balances of the departments of government and the oversight of the American people reviewed executive discretion. Not so in the case at hand.

The defendants assert that the tenor of this country fifteen and twenty years ago was similar to that during the wartime emergency. To justify the analogy of real war to "cold war", defendants refer the Court to *Communist Party of America* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961), concerning the cold war mentality. Its quotations of legislative and administrative findings do not begin to persuade this Court that the conditions of World War II may be analogized to later events, that a declaration of war may be analogized to no declaration of war, and that *Korematsu* is precedent for any but the gravest wartime measure, if that. However, such citations as *Communist Party of America* v. *Subversive Activities Control Board* may be made by the defendants when they offer proof as to the subjective element of their good faith defense.

This discussion of fourth amendment law is not meant to be dispositive. But this is a complex case, requiring the active guidance of the Court pursuant to Fed. R.Civ.P. 23(d). It seems best to be explicit about the Court's current analysis which determines its understanding of the shape this case will take at trial.

At this early stage of litigation, the Court is not ready to make the determination the plaintiffs wish. Neither is this Court willing to presume that on the merits it will create so expansive an exception to the warrant and probable cause requirements of the fourth amendment as to make class treatment of the middle sub-group unmanageable.

Whatever the final merits of the fourth amendment arguments of the parties, it does seem clear that the three groups of letter-writers and -receivers are distinct. Treat-

ing them distinctly will highlight the different fourth amendment claims and defenses and will facilitate analysis at trial. Treating them separately may permit class rulings on the fourth amendment claims with regard to the middle group which would not be possible were it lumped with the watch-list class.

Moreover, certain questions of fourth amendment law may be exclusively common to this middle sub-group, thus making separate class treatment especially apt. Insofar as letters were opened because of an oganizational name or a common address, issues are raised of associational freedom and of the limits the first amendment places upon permissible criteria of fourth amendment reasonableness. *Cf. United States* v. *United States District Court,* 407 U.S. at 313-14; *Robel* v. *U.S.,* 389 U.S. 253, 263 n.7 (1967); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958). Also common to this middle sub-group is the question of the applicability of a case like *Kent* v. *Dulles,* 357 U.S. 116, 126-27 (1958) which discusses a citizen's interest in the free and unfettered flow of international information, especially of an academic nature. But *cf. United States* v. *Twelve 200 Ft. Reels of Film,* 413 U.S. 123 (1972); *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972).

There is no difficulty certifying this middle group for 23b(2) relief since all the reasons which justified the certification of the two sub-classes in the original class determination are equally applicable to this third sub-class, *Driver* v. *Helms,* 74 F.R.D. at 403-05. The defendant United States admits as much.[12]

The complex question arises with regard to 23b(3) certification. In this regard, it is worth considering the original opinion at length wherein this Court said:

12. See Memorandum on Class Certification of Defendant United States at 1, footnote.

> The Court has already determined to make a class-wide adjudication of the legality of the intercept program under Rule 23(b)(2). Adjudication of the issue of liability will add only the element of any good faith or other defense that defendants choose to raise. Since the random sub-class members are completely fungible, having been selected by chance and the accident that they all corresponded with persons in the Soviet Union, it cannot be said that the validity of any defenses raised will vary from individual to individual, or that any individual class member will have any special interest in controlling his or her individual litigation. Judicial economy, the prevention of multiple lawsuits, the absence of any substantial difficulty in concentrating this litigation in this forum—all of these factors lend additional support to the Court's conclusion that defendants' liability to the random sub-class should be adjudicated as a class action.
>
> Application of the Rule 23(b)(3) criteria to the watch-list sub-class leads to a quite different conclusion. Defendants have made it clear that they plan to defend against liability for the mail surveillance of watch-listed persons on the grounds that they reasonably believed that each such surveillance was proper. When the Court considers the extensive pre-trial discovery and trial testimony that such a defense will entail, it must conclude that the question of the manageability of such a class action raised by defendants is no mere spectre, and poses serious problems that render class action certification of the watch-list sub-class on the question of defendants' liability inappropriate at this time. *id.* at 407 (footnote omitted).

While not at all free from doubt, it appears that certain economies of litigation might be achieved by certifying the middle sub-class for damage relief. Such certification will

present to the Court common questions of law and fact with regard to the entire middle sub-group and with regard to the various portions of the sub-group whose letters were opened for one and the same reason. For example, the same fourth amendment determination of reasonableness must be made as to all persons whose letters to and from Moscow State University were opened by reason of that address; the only issue which might vary at trial, from class member to class member, would be differing claims of good faith made by officials who served at different times during the Intercept program. If it should become clear to the Court that the various good faith defenses or the multiplicity of groups within the middle sub-class make the trial of this sub-class unmanageable, this Court can later alter this decision . *See Lamphere* v. *Brown University,* 553 F.2d 714, 720 (1st Cir. 1977).

An additional point needs consideration. In its Memorandum, the United States goes so far as to assert, on the basis of new information, that class treatment of this suit is altogether improper because it finds that of the 200,000 seized letters on file, the CIA has no record of why any one of them was seized. It has no indication of whether a letter was randomly seized or on the watch-list. Further, a CIA official affirms in affidavit that it has only fragmentary copies of a few watch-lists; that based on this incomplete information, however, some of the watch-lists in use for varying periods during the past 20 years could be pieced together to identify some letters as belonging to one or the other sub-classes; and that sufficient information also exists to permit guess work, of varying degrees of accuracy, concerning the reasons for seizing other letters. The United States claims that these difficulties make class treatment impossible, because few class members will be able to prove

their membership in one or the other of the sub-classes; that burden, asserts the defendant U.S., is on each class member.

The United States misperceives the position in which the defendants are put by this lack of evidence. Proof of membership in the general class can easily be made from the 200,000 letters which the CIA has. The importance of identifying the selection criterion for each letter lies with the defendant's probable cause or reasonableness defense; for the sub-classes were distinguished by the Court on the basis of the different defenses which might be offered. This defense is an affirmative one which the defendants must sustain. The presumption as to warrantless searches and seizures is against reasonableness and not in its favor. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454-55 (1971) *cf. United States* v. *United States District Court,* 407 U.S. 297 (1972). It is appropriate, therefore, for a class member to be presumed in the random class until the defendants assert some specific reason for the seizure of his or her letter. The watch-list sub-class was created for the purpose of facilitating trial by separating those class members as to whom the defendants would assert a specific probable cause or reasonableness and good faith defense from those class members as to whom only a general defense of reasonableness could be made. A presumption that class members are in the random class until a reason is alleged to the contrary is justifiable under this rationale.

Further, it would be open to the defendants to try to prove the contents of now lost watch-lists by a statistical factor-analysis of all letters in order to argue that a certain common characteristic (such as a certain address) statistically accounts for why a group of letters was selected. Such analysis would have to be based on a complete review

of all letters or a random sample of all letters. This would be, in effect, class treatment by the defendants, for their proof would be based on all letters seized. If proof goes forward on a class basis, then the trial itself should go forward on the same basis.

CERTIFICATION FOR APPEAL

The defendants have moved for the certification of this Court's decision on class treatment for appeal to the First Circuit pursuant to 28 U.S.C. § 1292(b) (1970). The certification of decisions on class treatment is in disfavor in this Circuit, *Lamphere* v. *Brown University,* 553 F.2d 714 (1st Cir. 1977). The Defendants have not overcome the presumption against such certification. This is a complex case. The decision as to class treatment is inextricably involved with questions of fourth amendment law and with the availability of evidence and certain defenses at trial. It is far too early for a final and definitive resolution of the issues at stake in this class certification. *Id.* at 720.

Raymond J. Pettine
Chief Judge
December 15, 1977

APPENDIX E

HOUSE OF REPRESENTATIVES
87th Congress—1st Session
Report No. 536

JURISDICTION AND VENUE OF THE U.S. DISTRICT COURTS IN ACTIONS AGAINST GOVERNMENT OFFICIALS

June 14, 1961.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Forrester, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 1960]

The Committee on the Judicary, to whom was referred the bill (H.R. 1960) to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the U.S. district courts, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia.

COST

This bill does not create new liabilities for the Government.

LEGISLATIVE HISTORY

An identical bill, H.R. 12622, passed the House in the closing days of the 86th Congress but was not acted upon by the Senate.

STATEMENT

This bill is directed primarily at facilitating review by the Federal courts of administrative actions. To attain this end the bill does two things: First, it specifically grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties; secondly, it broadens the venue provisions of title 28 of the United States Code to permit an action to be brought against a Government official in the judicial district where the plaintiff resides, or in which the cause of action arose, or in which any property involved in the action is situated. This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia.

Where a statute does not specifically provide for review of the actions of a Government official, the aggrieved party may obtain judicial review through invoking one of several nonstatutory proceedings. Which of these he chooses turns upon the relief sought. In certain cases, the relief desired can be obtained only by compelling a Government official to perform an act which he is required to do by statute but which he has nevertheless failed to do. Traditionally, the appropriate remedy in that case has been a writ of mandamus. However, unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed

jurisdiction to hear petitions for mandamus. Nor has the abolition of mandamus by rule 81(b) of the Federal Rules of Civil Procedure altered this jurisdictional limitation, since the Federal rules did not change either the substance of the relief which the district courts could grant or the cases over which they had jurisdiction.

The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia. This court, in addition to being a Federal court, is also charged with the enforcement of domestic law. Its jurisdiction is derived not only from title 28 but also from the laws of the State of Maryland, which governed the area ceded to the District of Columbia in 1801. That body of law included jurisdiction to issue writs of mandamus in original proceedings.

The result of this historic accident has been that a person who seeks to have a Federal court compel a Federal official to perform a duty of his office must bring his action in the District Court for the District of Columbia. This the committee considers an unfair imposition upon citizens who seek no more than lawful treatment from their Government.

Section 1 of this bill therefore amends chapter 85 of title 28 of the United States Code to provide specifically that all district courts shall have original jurisdiction over any action to compel an officer or employee of the United States or any agency thereof to perform his duty.

Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued. It is not

intended to create governmental liability where it does not now exist. It is concerned only with the place where the action may be brought.

The problem of venue in actions against Government officials for judicial review of official action arises when the action must be brought against supervisory officials or agency heads whose official residences are, with few exceptions, in the District of Columbia. The need to bring an action against an agency head rather than an official in the field may arise either because of a statute authorizing such a suit or because of the doctrine of indispensable parties. The question of when a superior officer is an indispensable party is not altogether clear from the cases. Suffice it is to say that if it is determined that a superior officer whose official residence is in the District of Columbia is an indispensable party, that action must be brought in the U.S. District Court for the District of Columbia.

The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty.

The committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice. Frequently, the administrative determinations involved are made not in Washington but in the field. In either event, these are actions which are in essence against the United States. The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. attorneys are present in every judicial district. Requiring

the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition.

On the other hand, where a citizen lives thousands of miles from Washington, where the property involved is located outside of the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government.

However, disregarding considerations of convenience, broadening of the venue provisions of title 28 to permit these actions to be brought locally is desirably from the standpoint of efficient judicial administration. Frequently, these proceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently.

In addition, the present venue provision results in a concentration of these actions in the District Court for the District of Columbia, a court which is already heavily burdened. Court congestion is increased and substantial delays are incurred. The broadened venue provided in this bill will assist in achieving prompt administration of justice by making it possible to bring these actions in courts throughout the country, many of which are not nearly as burdened as the District Court for the District of Columbia.

To achieve these results, section 2 of this bill amends section 1391 of title 28 of the United States Code to provide that an action may be brought against an officer or an employee of the United States or any agency thereof acting

in his official capacity or under color of legal authority, or an agency of the United States, in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated.

By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391 (e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

In order to give effect to the broadened venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a

Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.

It is contemplated that where an action is only nominally brought against an official, as an individual, service may be had in the manner provided by rule 4(d)(5). The exception to the territorial limitation on service provided in this bill would, of course, be equally applicable to that situation.

The bill does not define the term "agency." However, it is contemplated that it will be taken to mean any department, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest.

The venue provision in this bill is supplementary rather than exclusive.

DEPARTMENTAL RECOMMENDATIONS

The Judicial Conference of the United States has expressed its approval of this bill.

The report of the Conference follows:

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., June 14, 1961.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report on H.R. 1960, a bill which would permit a civil action to be brought against an officer of the United States

in any judicial district where any plaintiff in the action resides. H.R. 1960 is identical to H.R. 12622 which was approved by the House of Representatives during the 86th Congress.

This proposal for amending the venue statute was studied by the Committees on Court Administration and Revision of the Laws, and favorable action was taken by the Judicial Conference of the United States.

H.R. 1960 (*a*) confers upon the district courts original jurisdiction of actions to compel officers or employees of the United States or agencies thereof to perform their duty, (*b*) provides that civil actions in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides or in which the cause of action arose or in which any property in the action is situated, and (*c*) provides that the summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The Judicial Conference approved the proposal at its session in September 1960, and in March 1961 specifically approved H.R. 1960, and the Conference recommends that the legislation be enacted.

Sincerely yours,

WARREN OLNEY III, *Director.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representives, there is printed below in roman existing law in which no change is proposed, with matter proposed to be stricken out enclosed in black brackets, and new matter proposed to be added shown in italic:

CHAPTER 85, TITLE 28, UNITED STATES CODE

Chapter 85. DISTRICT COURTS; JURISDICTION.

* * *

* * *

§ *1361. Action to compel an officer of the United States to perform his duty.*

The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty.

Chapter 85. DISTRICT COURTS; JURISDICTION.

Sec.

* * *

* * *

1361. Action to compel an officer of the United States to perform his duty.

CHAPTER 87, TITLE 28, UNITED STATES CODE

§ 1391. Venue generally.

* * *

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* * *

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of the action arose, or in which any property involved in the action is situated.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

APPENDIX F

Pending cases of which petitioners are aware in which the questions presented are being or have recently been litigated.

1. Blair *v.* Baumgardner, Civil Action No. 77-C-390 (E.D. Wisc.)

2. Halkin *v.* Helms, Civil Action No. 75-1773 (D.D.C.)

3. The Black Panther Party *v.* Levi, Civil Action No. 76-2205 (D.D.C.)

4. Sigler *v.* LeVan, Civil Action No. EP77-CA 35 (W.D. Tex.)

5. Briggs *v.* Goodwin, 569 F.2d 1 (D.C. Cir. 1977), *petition for cert. filed* No. 77-1546 (April 30, 1978)

6. Todd *v.* Brown, Civil Action No. 77-185-TUC-MAR (D. Ariz.)

7. Lamont *v.* Haig, No. 75-2006 (D.C. Cir.)

8. Guilday *v.* Department of Justice, Civil Action No. 4578 (D. Del.)

9. McCarthy *v.* Jonnard, Civil Action No. 77-695-A (E.D. Va.)

10. Misko *v.* United States, Civil No. 77-875 (D.D.C.)

11. Berlin Democratic Club *v.* Brown, No. 310-74 (D.D.C.)

12. Horman *v.* Kissinger, Civil Action No. 77-1748 (D.D.C.)

13. Mason *v.* Clayton, Civil Action No. 77-0995 (D.D.C.)

14. Bertoli *v.* SEC, 77 Civ. 1450 (S.D.N.Y.)

15. National Lawyers Guild *v.* Attorney General, 77 Civ. 999 (S.D.N.Y.)

16. LaRouche *v.* Kelley, 75 Civ. 6010 (S.D.N.Y.)

17. Clavir *v.* United States, 76 Civ. 1071 (S.D.N.Y.)

APPENDIX G

Title 28—Judicial Administration

CHAPTER 1—DEPARTMENT OF JUSTICE

[Order No. 683-77]

PART 50—STATEMENTS OF POLICY

Limitation for Representation of Federal Employees

AGENCY: Department of Justice.

ACTION: Statement of policy.

EFFECTIVE DATE: January 31, 1977.

SUMMARY: The attached statement of policy describes the limits within which the Department may provide for representation of Federal employees with respect to employment-related matters in which they are involved in their individual capacity. Representation in these matters is limited to state criminal proceedings, and civil and Congressional proceedings.

SUPPLEMENTARY INFORMATION: It may be helpful to set forth briefly the manner in which the representation authority set forth in the statement of policy is currently being applied. Bearing in mind that extraordinary situations may justify going to the outer limits of the guidelines, the present practice of the Department is as follows:

1. The Department will represent an employee who is sued or subpoenaed in his individual capacity, if the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of his employment and if he is not the target of a Federal criminal investigation with respect to such actions.

2. Where, although the employee reasonably appears to have acted within the scope of his employment, a pending investigation has disclosed some evidence of his specific participation in a crime, the Department will pay for representation by a private attorney.

3. The Department will likewise pay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department.

4. The Department will not represent, or pay for the representation of, any employee, if, with respect to the acts that are the subject of the representation, an indictment or information has been filed against him by the United States or a pending investigation of the Department indicates that he committed a criminal offense.

5. The Department will not provide or pay for representation where the positions taken would oppose positions maintained by the United States itself.

By virtue of the authority invested in me by 28 U.S.C. 509, Part 50 of Chapter I of Title 28 of the Code of Federal Regulations is hereby amended by addition of the following §§ 50.15 and 50.16:

§ 50.15 Representation of Federal Employees by Department of Justice Attorneys or by Private Counsel Furnished by the Department in State Criminal Proceedings and in Civil Proceedings and Congressional Proceedings in Which Federal Employees Are Sued or Subpoenaed in Their Individual Capacities.

(a) Under the procedures set forth below, a federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in

state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by § 15.1 of this chapter.

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit a request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency, forthwith. The employee's employing federal agency shall submit to the Civil Division in a timely manner a statement, with all supporting data, as to whether the employee was acting within the scope of his employment, together with its recommendation as to whether representation should be provided. The communication between the employee and any individual acting as an attorney at his employing agency, with regard to the request for representation, shall be treated as subject to the attorney-client privilege. In emergency situations the Civil Division may initiate conditional representation after communication by telephone with the employing agency. In such cases, appropriate written data must be subsequently provided.

(2) Upon receipt of the agency's notification of request for counsel, the Civil Division will determine whether the employee's actions reasonably appear to have been performed within the scope of his employment, and whether providing representation is in the interest of the United States. If a negative determination is made, Civil Division will inform the agency and/or the employee that no representation will be provided.

(3) Where there appears to exist the possibility of a federal criminal investigation or indictment relating to the

same subject matter for which representation is sought, the Civil Division will contact a designated official in the Criminal Division for a determination whether the employee is either a target of a federal criminal investigation or a defendant in a federal criminal case. An employee is the target of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime. In appropriate instances, Civil Rights and Tax Divisions and any other prosecutive authority within the Department should be contacted for a similar determination.

(4) If the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") indicates that the employee is not the target of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter other than that for which representation has been requested, then representation may be provided.

(5) If the prosecuting division indicates that the employee is the target of a criminal investigation concerning the act or acts for which he seeks representation, Civil Division will inform the employee that no representation by Justice Department attorneys will be provided. If the prosecuting division indicates that the employee is a target of an investigation concerning the act or acts for which he seeks representation, but no decision to seek an indictment or issue an infomation has been made, a private attorney may be provided to the employee at federal expense under the procedures of § 50.16.

(6) If conflicts exist between the legal or factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Some situations may make it advisable that private representation be provided to all conflicting groups and that Justice Department attorneys be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(7) Once undertaken, representation under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures, have ended, or until any of the foregoing bases for declining or withdrawing from representation is found to exist, including without limitation the basis that representation is not in the interest of the United States. In any of the latter events, the representing Department attorney on the case will seek to withdraw but will ensure to the maximum extent possible that the employee is not prejudiced thereby.

(8) Justice Department attorneys who represent employees under this section undertake a full and traditional attorney-client relationship with the employees with respect to the attorney-client privilege. If representation is discontinued for any reason, any incriminating information gained by the attorney in the course of representing the employee continues to be subject to the attorney-client privilege. All legal arguments appropriate to the employee's case will be made unless they conflict with governmental positions. Where adequate representations requires the making of a legal argument which conflicts with a governmental position, the Department attorney shall so advise the employee.

(b) Representation by Department of Justice attorneys is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding in which the employee is a defendant;

(2) The employee is a target of a federal criminal investigation on the same subject matter;

(3) The act or acts with regard to which the employee desires representation do not reasonably appear to have been performed within the scope of his employment with the federal government; or

(4) It is otherwise determined by the Department that it is not in the interest of the United States to represent the employee.

§ 50.16 Representation of Federal Employees by Private Counsel at Federal Expense.

(a) Representation by private counsel at federal expense may be provided to a federal employee only in the instances described in § 50.15 (a)(5) and (a)(6).

(b) Where private counsel is provided, the following procedures will apply:

(1) The Department of Justice must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the employing agency.

(2) Federal payments to private counsel for an employee will cease if the Department of Justice (i) decides to seek

an indictment of or to issue an information against that employee on a federal criminal charge relating to the act or acts concerning which representation was undertaken; (ii) determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment; (iii) resolves the conflict described in § 50.15(a)(6) and tenders representation by Department of Justice attorneys; (iv) determines that representation is not in the interest of the United States; (v) terminates the retainer with the concurrence of the employee-client, for any reason.

(c) In any case in which the employee is not represented by a Department of Justice attorney, the Department of Justice may seek leave to intervene or appear as amicus curiae on behalf of the United States to assure adequate consideration of issues of governmental concern.

Dated: January 19, 1977.

EDWARD H. LEVI,
Attorney General.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 1450

RICHARD BERTOLI,
Plaintiff,

—against—

THE SECURITIES AND EXCHANGE COMMISSION, et al.,
Defendants.

MEMORANDUM AND ORDER

OWEN, District Judge

Before me are three motions. The first is by defendants to dismiss plaintiff's complaint seeking declaratory and injunctive relief, as well as damages, as a result of allegedly illegal searches and seizures conducted at various offices in New York and New Jersey in violation of plaintiff's fourth amendment rights. The second and third motions are cross motions having to do with discovery, pro and con.

Turning to the first motion and the declaratory relief sought in this case—that any use in connection with a civil or criminal investigation or prosecution of information garnered or materials seized from the various locations in New Jersey and New York in alleged violation of plaintiff's fourth amendment rights is illegal—it is essentially equivalent to the injunctive relief sought, that is, a prohibition

against the use of any such information or materials. A grant of declaratory or injunctive relief would in these circumstances have substantially the same effect as an order pursuant to Fed. R. Crim. P. 41(e) for the return of the seized property, which I am denying in a separate memorandum and order because of a related criminal indictment against plaintiff pending in the District of New Jersey.

It would be a manifest abuse of discretion for this court to exercise jurisdiction over the requests for injunctive and declaratory relief where, as here, to do so would necessarily be to interfere with criminal proceedings pending in another federal judicial district. *See Smith* v. *Katzenbach*, 351 F.2d 810, 816 (D.C. Cir. 1965). Accordingly, defendants' motion to dismiss plaintiff's first two prayers for relief, denominated XIII(a) & (b) in the complaint, is granted.

Plaintiff's allegation of $2,000,000 damages is based on the theory of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).[1] The named defendants move to dismiss it on the ground that the complaint fails to state a claim upon which relief may be granted, and defendants Johnathan L. Goldstein, the United States Attorney for the District of New Jersey at the time the complaint was filed, and Charles J. Walsh, an employee of the United States Attorney for the District of New Jersey, claim in addition that the court lacks personal jurisdiction over them for purposes of the *Bivens* claim because they were not served

1. Plaintiff maintains that the facts pleaded in the complaint also state a claim for relief under 42 U.S.C. §§ 1985(3) & 1986. There is no merit to this claim. At the minimum, there must be an allegation, which is lacking here, of some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (footnote omitted). In addition, these sections of Title 42 are inapplicable to federal officials acting under color of federal law. *Williams* v. *Halperin*, 360 F. Supp. 554, 556 (S.D.N.Y. 1973).

within the state and the complaint fails to state facts upon which the court could assert long-arm jurisdiction over them pursuant to Fed. R. Civ. P. 4(e) and N.Y.C.P.L.R. § 302(a)(2).

The vice of plaintiff's complaint with respect to the *Bivens* cause of action against the eight named defendants associated with the SEC is that the complaint merely identifies them as "officials and employees of the SEC," and thereafter never refers to any of them again by name. Instead, plaintiff refers throughout to the "defendants" and the "defendants acting individually and/or in concert". With plaintiff alleging numerous illegal searches and seizures at various locations over a period of more than nine months, this type of pleading is obviously unfair and insufficient. It is impossible for any of the named defendants to know from the complaint exactly what he is being made to answer for, and where and when the actions complained of against him were taken.

In order to withstand a motion to dismiss a *Bivens*-based claim must assert as to each defendant—named or unnamed—his personal participation in the conduct complained of, *see, e.g., Buck* v. *The Board of Elections*, 536 F.2d 522, 524 (2d Cir. 1976), and just as in the case of a civil rights complaint brought under 42 U.S.C. § 1983 against a state official, liability may not be predicated merely upon the doctrine of *respondent superior*. *E.g., Black* v. *United States*, 534 F.2d 524, 527-28 (2d Cir. 1976); *Morpurgo* v. *Board of Higher Education*, 423 F. Supp. 704, 713-14 (S.D.N.Y. 1976).

Plaintiff's conclusory allegations of conspiracies to deprive him of his fourth amendment rights, lodged against these defendants without the pleading of overt acts committed by them in furtherance of the conspiracy, are also insufficient to state a claim for relief. *See Jacobson* v.

Organized Crime and Racketeering Section of the United States Department of Justice, 544 F.2d 637, 639 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977); *Powell* v. *Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964).

Against these standards it is plain that plaintiff has failed to state a *Bivens* claim upon which relief may be granted against the eight defendants assertedly associated with SEC.

Of course, the foregoing applies equally well to defendants Goldstein and Walsh. In addition, the allegations made specifically against them on information and belief, see ¶¶ 11 and 53 of the complaint, suffer from the same infirmity previously discussed—lack of specificity.

Lastly, plaintiff relies on 28 U.S.C. § 1391(e) as conferring personal jurisdiction on this court over defendants Goldstein and Walsh. This section, however, only controls venue once personal jurisdiction and jurisdiction over the subject matter are independently established. *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16, 20 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969). Since defendants Goldstein and Walsh were not served in the Southern District of New York and the conclusory allegations of conspiracy or agency are insufficient to confer long-arm jurisdiction over them under N.Y.C.P.L.R. § 302, *see Lehigh Valley Industries, Inc.* v. *Birenbaum*, 527 F.2d 87, 89&n.1, 93-94 (2d Cir. 1975), this court must dismiss the *Bivens* claim against them on the additional ground of lack of personal jurisdiction.

Plaintiff has recently apprised the court in an unverified letter of the names of several of the persons alleged by him to have actually committed the searches and seizures complained of. Accordingly, plaintiff will be given leave to replead against those whom he can properly charge by

name, and plaintiff will also be afforded discovery to the extent necessary to learn who else, if anyone, was on the premises allegedly controlled by him and in violation of his fourth amendment rights.

However, since a substantial criminal prosecution is facing plaintiff in the District of New Jersey, and since many, including potentially dispositive threshhold issues in the *Bivens* action will no doubt be determined in the New Jersey prosecution, this court will defer further proceedings in the instant case until after the pending criminal charges in the District of New Jersey have been resolved, both in the interest of judicial economy, *see United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968), and also to protect the government from having to comply with discovery demands of plaintiff in a civil suit as an expedient to circumvent the more restrictive discovery applicable rules in criminal cases, *e.g.*, *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See United States* v. *Kordel*, 397 U.S. 1, 12 n.27 (1970). Thus, plaintiff's motion for an order compelling defendants to answer his interrogatories is also denied, without prejudice.

In sum, plaintiff's claims for declaratory and injunctive relief are dismissed, the *Bivens* claim against all ten named defendants is dismissed without prejudice and with leave to replead, provided, however, that further proceedings, including repleading pursuant to leave, are deferred pending the outcome of plaintiff's trial on criminal charges in the District of New Jersey.

Submit order on notice.

November 4, 1977.

R. Owen
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. EP-77-CA-35

ILSE M. SIGLER, *et al*,

Plaintiffs,

v.

MAJOR GENERAL C. J. LEVAN, *et al*,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs have filed the instant Complaint alleging that the Defendants, individually and acting in combination, conspiracy and concert of action, either murdered Ralph J. Sigler or placed him in a position of extreme danger and failed to protect him, in violation of the Fifth Amendment to the Constitution of the United States of America, and that the Defendants, individually and acting in combination, conspiracy and concert of action, did, in violation of the Fourth Amendment to the Constitution of the United States of America, unlawfully seize the papers, personal property, and memorabilia of Ralph J. Sigler. Plaintiffs allege that the Defendants, in committing such actions, were acting in their official capacity or under the color of legal authority.

I.

Plaintiffs' Complaint asserts that this Court has venue of this action under 28 U.S.C. § 1391(b) and (e). Those provisions are:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the Rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." 28 U.S.C. § 1391.

Defendant, MAJOR GENERAL C. J. LEVAN, has moved the Court to dismiss Plaintiffs' claim against LEVAN asserting, among other things, that Section 1391 does not authorize maintenance of this suit in the Western District of Texas. LEVAN contends specifically that Plaintiffs' asserted basis for venue, Section 1391(4) does not apply to a suit against an individual officer of the United States when that suit

requests relief in the form of money damages for defendant's individual action.

II.

Plaintiffs' claim can be summarized as a claim for relief based on two separate theories. First, Plaintiffs claim monetary damages resulting from the death of Ralph J. Sigler because of Defendants' alleged violation of Ralph J. Sigler's rights under the Fifth Amendment to the Constitution of the United States of America. Second, Plaintiffs seek to recover Ralph J. Sigler's papers, chattels, and memorabilia allegedly wrongfully taken from Ralph J. Sigler in violation of his rights under the Fourth Amendment to the Constitution of the United States of America. Plaintiffs' first claim is for monetary relief and their second claim is in the form of a request for a mandatory injunction.

III.

Defendant LEVAN contends that 28 U.S.C. § 1391(e) is inapplicable to an action against a Government official for monetary damages. Defendant argues that, although the literal reading of the statute provides venue in a district where the plaintiffs reside, that provision cannot be read literally, but must be read in conjunction with 28 U.S.C. § 1361, providing the District Court of the United States with jurisdiction over mandamus proceedings against a Government official.

Plaintiffs respond with the contention that Section 1391(e)(4) provides a basis for venue as it makes no distinction between actions in the nature of injunction and mandamus on one hand and actions for monetary damages on the other hand.

IV.

In support of his argument that Section 1391(e) is inapplicable to Plaintiffs' cause of action seeking monetary relief, Defendant relies most heavily on the case of *Natural Resources Defense Counsel, Inc.* v. *Tennessee Valley Authority,* 459 F.2d 255 (2nd Cir. 1972). In *Natural Resources,* plaintiff, a New York resident, sued a defendant whose residence was established by federal statute in Alabama. Plaintiff sought to maintain venue in New York, (plaintiff's residence), under 28 U.S.C. § 1391(3)(4). Defendant moved to dismiss the claim for lack of proper venue, contending that Section 1391(e) was not intended to apply to an action against a locally based federal business corporation such as the TVA, but only to actions against federal officers or agencies which, prior to enactment of Section 1391(e) could have been brought only at the seat of federal government, in the district court for the District of Columbia.

In ruling that Section 1391(e) did not provide a basis for venue of plantiff's claim, Chief Judge Friendly made a searching analysis of the history and purpose behind that section. Section 1391(b) was only a part of the Congressional enactment of Public Law No. 87-748, 87th Congress (1961). The companion statute is codified as 28 U.S.C. § 1361, which gives the United States District Court original jurisdiction of actions in the nature of mandamus to compel an officer or employee of the United States or any agency of the United States to perform a duty owed to the plaintiff. The Judicial Subcommittee to which the original bill was referred reported as follows:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in the United States District Courts outside the

District of Columbia, on jurisdiction and venue, may now be brought only in the U.S. District Court of the District of Columbia." H.R. Rep. No. 536, 87th Congress, First Session, page 1.

The need for such legislation arose from the decision in *McIntire* v. *Wood,* 11 U.S. (7 Cranch) 504, 3 L.Ed. 420 (1813), denying to the lower federal courts mandamus jurisdiction over federal officers, with the exception of mandamus actions maintained in the District of Columbia. *Kendall* v. *United States ex. rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). In addition to the unavailability of the federal district court for mandamus actions, injunctions were permissible only when the superior officer in Washington was not an indispensable party, as he was the individual who would be required to take the action requested by the injunction. *Williams v. Fannings,* 332 U.S. 490, 493, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947).

The decision in *Natural Resources* was based on the opinion of the United States Court of Appeals for the Second Circuit that the specific purpose of Section 1391(e) was to broaden the venue of civil actions which should have previously been brought only in the District of Columbia. *Id.* at 259. The Court concluded that, since the TVA could, prior to the enactment of Section 1391(e), be sued outside the District of Columbia, Section 1391(e) was inapplicable to an action against the TVA. The TVA had always been subject to suit, with the same venue limitations as other corporations in any district in which it did business. *Id.* at 259.

Defendant LEVAN concludes, therefore, that an action against a federal employee in his individual capacity, seeking the remedy of monetary damages, is not governed by Section 1391(e), as it is not the type of action which could

previously have been brought only in the District of Columbia.

V.

Plaintiffs contend that the law in Fifth Circuit, as evidenced by *Ellinburg* v. *Connet,* 457 F.2d 240 (5th Cir. 1972), dictates that Section 1391(e)(4) provides venue in the district of plaintiff's residence for a cause of action against a federal employee in his individual capacity, seeking monetary relief.

In *Ellinburg,* petitioner was a prisoner at Texarkana, Texas, within the Eastern District of Texas. Petitioner filed a petition for mandamus against several prison officials residing in Texarkana, requesting that the Court order the defendant (1) to remove detainers against the petitioner, (2) to drop the practice of opening Petitioner's mail, (3) to grant petitioner the "minimum custody" status, (4) to stop spying on the prisoners, and (5) to refrain from serving unequal portions of food to different prisoners. The trial court dismissed the petition, saying that it was a habeas corpus petition which must be brought in the district where the prison was located.

The United States Court of Appeals for the Fifth Circuit concluded that the district court was erroneous in characterizing the petition as a habeas corpus petition, holding that it was a petition in the nature of mandamus. The Court then looked to each of the specific venue alternatives under Section 1391(e). Subsection 1 thereof provides that the action may be brought in a district where a defendant resides. None of the defendants resided within the Northern District; therefore, venue was not proper under Subsection 1.

Subsection 2 provides that venue is properly laid where a cause of action arises. Plaintiff's complaint did not state

that any cause of action arose within the Eastern District of Texas; therefore, venue under Subsection 2 was not proper.

Subsection 3 provides venue only in a case where real property is involved. The Court concluded that Subsection 3 was inapplicable.

Subsection 4, providing venue in the place of plaintiff's residence, gave rise to the Fifth Circuit's surmise that venue may properly have been laid in the Northern District of Texas. The Court noted that, although petitioner was incarcerated in Texarkana, within the Eastern District of Texas, the record did not adequately show whether petitioner may actually have been a resident of the Northern District of Texas. The Court remanded the case to the trial court for a determination of whether plaintiff was a resident of the Northern District.

The opinion in *Ellinburg* is lacking in analysis of the purposes and history of Section 1391(e). The Court did not differentiate between a claim for monetary damages and a request for mandamus. It is clear from a reading of the *Ellinburg* opinion that plaintiff's original petition contained requests for mandamus and injunctive relief. If monetary damages were requested, that request was clearly incidental to plaintiff's primary remedial request.

The main thrust of the *Ellinburg* opinion was that the trial court failed to consider all possibilities for appropriate venue, and should have been more deliberate in broadly construing the pro se complaint of the petitioner.

Plaintiffs cite several district court cases in support of the proposition that Section 1391(e)(4) provides venue in the district of plaintiff's residence in a suit requesting monetary relief.

Lowenstein v. *Rooney,* 401 F.Supp. 952 (E.D.N.Y. 1975) was an action against government officials in Washington,

alleging that those officials took action in Washington, D.C., to conspire against the plaintiff and cause him to lose a Congressional election. Plaintiff's complaint sought declaratory and injunctive relief as well as damages.

In determining that venue was properly laid in New York, the district of plaintiff's residence, the Court cited legislative history to the effect that Section 1391(e)(4) applied to an action where the defendant was allegedly "acting within the apparent scope of his authority and not as a private citizen." H.R. 1960, 87th Congress, First Session (1961); *Id.* at 962. The Court, however, undertook no analysis of the history or purpose of Section 1391(e), nor did it address the legislative history providing that the purpose of that section was to broaden the venue provision of those actions which previously could have been brought only in the District of Columbia.

The *Lowenstein* opinion is directly at odds with the opinion in *Natural Resources,* and does not attempt to distinguish *Natural Resources* or to be compatible with *Natural Resources,* although the Court rendering the *Lowenstein* decision is within the Second Judicial Circuit; the Circuit which rendered the *Natural Resources* opinion.

Plaintiffs also rely on *Briggs* v. *Goodwin,* 384 F.Supp. 1228 (D.D.C. 1974) and *Wu* v. *Kenny,* 384 F.Supp. 1161 (D.D.C. 1974). In *Briggs* plaintiff brought a suit against four government attorneys who had been in charge of a former criminal prosecution against the plaintiffs where plaintiffs had been acquitted. On a motion by the defendants to transfer the case from Washington, D.C. to North Carolina, the Court ruled that Section 1391(e) provided venue, as it was the place of residence of one of the defendants. There was no discussion of the legislative history of Section 1391(e). Additionally, the Court was not con-

cerned, as is the Court in the instant case, with the subsection of Section 1391(e) dealing with venue in the place of Plaintiffs' residence. There was no discussion of the relief requested, and whether that relief was monetary or in the form of injunctive or mandatory relief. The Court merely concluded that the burden rested upon the Defendants to show reason why there should be a transfer, and that Defendants had failed to meet that burden. *Id.* at 1230.

In *Wu* the plaintiff sued the defendants for statements allegedly made by defendants, which statements lead to the denial of plaintiff's application for a grant from the National Endowment for Humanities. The summons and complaint were served upon the defendants in the manner provided in Section 1391(e), that is, by certified mail beyond the territorial limits of the district in which the action was brought. The Court rejected the defendants' contention that Section 1391(e) was inapplicable in a tort action for damages, and concluded that Section 1391(e) was applicable, since such actions were "probably not specifically contemplated by Congress," but appeared to fall within the literal bounds of Section 1391(e). *Id.* at 1168.

The continuing authority of *Briggs* and *Wu* is questionable in light of dicta from the United States Court of Appeals for the District of Columbia in *Relf* v. *Gasch,* 511 F.2d 804 (D.C. Cir. 1975), stating that Section 1391(e) applies only if a claim is stated against a federal officer in his official capacity; in actions involving a federal officer individually, the rule is not available. *Id.* at 808, n. 18.

VI.

The Court finds the decisions in cases limiting the applicability of Section 1391(e) to be the better-reasoned authority. These decisions thoroughly consider the legislative history of the statutes, analyze the historical inability

to proceed against government officials acting in their official capacity, and analyze the distinctions between the nature of the relief requested by Plaintiffs attempting to lay venue under Section 1391(e). *See Quinata* v. *Kelly.* 430 F.Supp. 1328 (E.D.Pa. 1977); *Rimar* v. *McCowan,* 374 F.Supp. 1179 (E.D.Mich. 1974); *Davis* v. *Federal Deposit Insurance Corp.,* 369 F.Supp. 277 (D.C.Colo. 1974); and *Holicky* v. *Selective Service Local Board No. 3,* 328 F.Supp. 1373 (D.C.Colo. 1971).

VII.

In Plaintiffs' claim for deprivation of Fifth Amendment rights, seeking monetary relief from the Defendants, all acts alleged to have been committed by the Defendants occurred outside the Western District of Texas. Plaintiffs do not claim that a cause of action arose, with respect to that cause of action, within the Western District of Texas. The allegations of Plaintiffs' Complaint are that Mr. Sigler reported, as ordered by the Defendants, to Ft. Meade, Maryland where he was subjected by the Defendants to extensive questioning and various types of threats and intimidations, the intent and effect of which was to force Mr. Sigler to end his own life.

Plaintiffs' asserted basis for jurisdiction is 28 U.S.C. § 1331(a), giving this Court jurisdiction over a cause of action arising under the Constitution of the United States of America. In such an action, when jurisdiction is not founded solely on diversity of citizenship, the appropriate venue is where all defendants reside, or where the claim arose, except as otherwise provided by law. Where Court to construe Section 1391(e), applying to actions against an officer of the United States, as allowing an action for monetary damages to be brought in the district of Plaintiffs' residence, the Court would be allowing Section 1391(e) to

expand the venue provision stated in Section 1391(b). In view of the legislative history of Section 1391(e), the Court concludes that it was not the intent of Congress to broaden venue in actions which could previously have been brought in any district wherein the claim arose.

Prior to the enactment of Section 1391(e), the Plaintiffs in this type of cause would not have been deprived of a forum at the place where the claim arose, as they would have been if the actions were one in the nature of mandamus or injunction. The Court concludes that it was not the intent of Congress to broaden venue provisions for an action requesting monetary damages, as such actions were not the evils at which Section 1391(e) was aimed.

An additional policy reason for refusing to allow a forum in the district of Plaintiffs' residence is the necessity of having government officials present in the places where they conduct their day-to-day activities. It is entirely proper to require a government official to be present at Court sessions and appear for Court proceedings in a district in which that official may have conducted illegal activity. However, to require a government official to be subject to suit at any point where a plaintiff may happen to reside, merely because that official may have conducted some activity in the Government's Capital, would be an undue burden on those persons who are responsible for Government operations.

The Court concludes, therefore, that the Western District of Texas is an improper place for the hearing of Plaintiff's claim against the Defendants for violation of Plaintiffs' Fifth Amendment rights claiming monetary damages from the Defendants.

VIII.

Defendant LEVAN does not consent the venue of Plaintiffs' claim for alleged deprivation of Fourth Amendment rights, which claim seeks relief in the nature of an injunction against the Defendants. That action is properly maintainable in the Western District of Texas, as it is the type of action at which Section 1391(e) was aimed.

IX.

The Western District of Texas is an appropriate venue for the maintenance of Plaintiffs' claim for violation of Ralph J. Sigler's Fourth Amendment rights, but is an improper venue for Plaintiffs' claim of Fifth Amendment violations.

Under the provisions of 28 U.S.C. § 1406(a), the Court, if it be in the interest of justice, may transfer a case to any district or division in which it could have been brought. The allegations of Plaintiffs' Complaint are to the effect that the wrongful death of Ralph J. Sigler occurred at Ft. Meade, Maryland, and that the Defendants' actions leading to Sigler's death were committed at Ft. Meade, Maryland. The Court will, therefore, transfer Plaintiffs' cause of action for violations of Fifth Amendment rights to the district court of Maryland.

Defendant LEVAN is the only one of the Defendants who has moved for dismissal for inappropriate venue. The parties have not briefed the question of transfer of the case against all Defendants.

The parties have not addressed the question of whether the Court should transfer the entire case, including the Fourth Amendment claim, in the interest of justice and for the convenience of parties and witnesses, pursuant to 28

U.S.C. § 1404(a). Under that section, the case may be transferred to any other district or division where it might have been brought. The parties have not briefed the question of whether Plaintiffs' claim of seeking the return of allegedly illegally seized documents might also have been brought in the district court in Maryland.

The Court, therefore, will withhold the transfer of the Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, will withhold a determination of whether to transfer the Fifth Amendment claim against the other Defendants and will withhold a determination of whether to transfer the Fourth Amendment claim, pending receipt, from all parties in this cause, of briefs pertaining to whether the entire action pending in the Western District of Texas should be transferred to the district court in Maryland.

X.

IT IS THEREFORE ORDERED that all parties in this cause file with the Court, within twenty (20) days of this date, briefs addressing the issue of whether the Court should, in addition to transferring Plaintiffs' Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, also transfer Plaintiffs' Fourth Amendment claim and Fifth Amendment claim against the other Defendants to the district court of Maryland, pursuant to 28 U.S.C. § 1404(a).

March 22, 1978

WILLIAM S. SESSIONS

William S. Sessions
United States District Judge

APPENDIX J

THE FEDERAL STATUTES CONTAINING PROVISIONS FOR NATIONWIDE SERVICE OF PROCESS

1. *Actions under the Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361:* The *res* is within the forum and is the subject matter of the litigation. It provides a fair basis for summoning the claimants into the forum to determine their respective rights thereto. See *Shaffer* v. *Heitner*, 433 U.S. 186, 208-09, and n.37.

2. *Actions seeking to assert rights in property where the defendant cannot be served within the state or does not voluntarily appear, 28 U.S.C. § 1655:* See paragraph 1 above.

3. *Process against the corporation in a shareholder's action, 28 U.S.C. § 1695:* The corporation in a derivative suit is a nominal party defendant and is the real party in interest on the plaintiff side. The nominal plaintiff has on behalf of the corporation selected the forum presumably having the best reach for the real defendants in mind.

4. *Injunction actions by the United States under Section 5 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 5, 25:* In antitrust conspiracy cases additional defendants may be summoned whether or not they reside in the district but only when the court finds *"that the ends of justice require"* [emphasis ours] that they be brought in. In these cases the out-of-state defendant must be added because it is claimed that he acted in combination with the in-state defendant or defendants already before the court. The combination in violation of the antitrust

laws must, at least at one end, have been committed in the forum state pursuant to the agreement of the out-of-state defendant.

5. *Actions against corporations under the antitrust laws, 15 U.S.C. § 22:* This statute specifically limits the districts in which suit can be brought to the district whereof the corporation is an inhabitant, may be found or transacts business. In any such instance the demands of due process are met since the corporate defendant would have "minimum contacts" with each such district.

6. *Actions in which a receiver is appointed and the land or other property of a fixed character, the subject of the action, lies within different districts, process may issue and be executed in any such district, 28 U.S.C. § 1692: See* paragraph 1 above.

7. *In certain actions under the interstate commerce laws pursuant to 28 U.S.C. § 2321 and 49 U.S.C. §§ 20, 23, 43:* Section 2321 of Title 28 applies only to actions brought by the United States (28 U.S.C. § 2322) to enforce Interstate Commerce Commission orders and permits process of district courts to run nationwide. ICC orders support a nationwide structure of operations adequate to meet the *International Shoe* test. ICC regulated carriers operate under licenses which may be properly made conditional upon a submission to nationwide jurisdiction. *Shaffer* v. *Heitner, supra* at 216.

8. *Actions by a national banking association under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of Currency, or any receiver acting under his direction, First National Bank of Eaton* v. *Comptroller of the Currency, 252 U.S. 504 (1919); 28 U.S.C. § 1394:* Such actions are brought to enjoin a banking official of the

United States with nationwide responsibilities and, by reason thereof, such official is "present" in the district of any bank subject to the exercise of his regulatory authority.

9. *Actions against officers of the United States, 28 U.S.C. § 1391(e):* This, of course, is the subject of this petition.

10. *Actions brought in the name of the United States on bonds of contractors for public buildings or works, 40 U.S.C. § 270(b):* Such suits on construction contract bonds are authorized in the district in which the contract was to be performed and executed. One who bonds such a contract would certainly have the necessary "minimum contacts" with the jurisdiction where the contract is to be performed.

11. *Actions brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. §§ 77v(a), 78aa:* These statutes specifically limit the districts in which suit can be brought to the districts where the defendant is found, or is an inhabitant, or transacts business, or where an offer or sale of securities took place, if the defendant participated therein. In any such instance the demands of due process are met since the defendant would have "minimum contacts" with each such district.

12. *Actions under the Investment Company Act of 1940, 15 U.S.C. § 80a-43:* This statute specifically limits the district in which suit can be brought to the district where the defendant is an inhabitant or transacts business. The demands of due process are met since the defendant would have "minimum contacts" with such districts.

13. *Actions under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y: See* paragraph 12 above.

14. *Actions against the Secretary of Health, Education and Welfare to review benefits under the Social Security Act, 42 U.S.C. § 405(g): See* paragraph 8 above. In addition, such an action is "nominally" against the Secretary, and "in essence" against the United States.